No. _____ (1)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

UTAH WOMEN'S CLINIC, INC.; EDWARD R. WATSON, M.D.; MADHURI SHAH, M.D.; LAUREL SHEPHERD, M.D.; ALISSA PORTER; WENDY EDWARDS; WASATCH WOMEN'S CENTER, P.C.; WILLIAM R. ADAMS, M.D.; DENISE DEFA; and SARAH ROE, on behalf of herself and all other similarly situated women from Utah and surrounding states,

Petitioners,

—v.—

MICHAEL LEAVITT, Governor of the State of Utah, in his individual and official capacities; JAN GRAHAM, Attorney General of Utah, in her individual and official capacities; and their successors,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a motion to alter or amend a judgment fail to toll the time to appeal the merits of the judgment if the motion attacks a portion of the judgment that imposes heavy sanctions for facially challenging the constitutionality of a restrictive abortion statute, post-*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), despite a contrary ruling by this Court, as well as contrary rulings by every other circuit to consider this issue?

PARTIES TO THE PROCEEDING

Utah Women's Clinic, P.C. is the only petitioner that is a corporation; it has no parent companies, subsidiaries which are not wholly-owned, or affiliates.

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Petitioners -- two health care facilities that provide approximately 98% of the abortions in the State of Utah, three Utah physicians who perform abortions, one Colorado physician who refers patients to Utah for abortions, one counselor who works with women seeking abortions in Utah, the administrators of these health care facilities, and one Utah-domiciled woman on her own behalf and on behalf of a certified class of all women who may seek abortions in the future in the State of Utah (hereinafter "petitioners") -- respectfully pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Tenth Circuit entered on November 22, 1995, to the extent that it dismissed a portion of petitioners' appeal.

OPINIONS BELOW

The report and recommendation of the magistrate judge of the United States District Court for the District of Utah was filed on November 10, 1993, and is not reported. 1a-97a. The opinion of the United States District Court for the District of Utah, adopting the magistrate's report and recommendation, was filed on February 1, 1994, and is reported at 844 F. Supp. 1482 (D. Utah 1994). 98a-128a. The district court denied the petitioner's motion to alter or amend pursuant to Fed. R. Civ. P. 59(e) (hereinafter "Rule 59(e)") on June 20, 1994, in an unpublished opinion. 130a-185a. The court of appeals' opinion was filed on November 22, 1995, and is reported at 75 F.3d 564 (10th Cir. 1995). 191a-200a. The court of appeals denied petitioners' petition for rehearing or, in the alternative, suggestion for rehearing *en banc* on January 25, 1996. 201a-202a.

JURISDICTION

Jurisdiction is proper in this Court pursuant to 28

U.S.C. § 1254(1) (1993), which provides for review by certiorari "upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

Jurisdiction was proper in the district court pursuant to 28 U.S.C. § 1331 (1993), because the complaint stated claims arising under the United States Constitution, and pursuant to 28 U.S.C. §§ 1343(a)(3) and 1343(a)(4) (1993), because the complaint stated claims arising under 42 U.S.C. § 1983.

The court of appeals had jurisdiction, pursuant to 28 U.S.C. § 1291 (1993), with respect to the following final orders and judgments entered by the district court: the Opinion and Order, entered February 1, 1994 (98a-128a); the Judgment, entered February 3, 1994 (129a); the Memorandum Decision and Order, entered June 20, 1994 (130a-185a); and the Judgment, entered July 15, 1994 (188a).

On February 14, 1994, petitioners filed a motion, pursuant to Rule 59(e), for reconsideration of the February 1 Opinion and Order and February 3 Judgment. Pursuant to Fed. R. App. P. 4(a)(4), that motion tolled the time for appeal until the motion was decided. The motion was decided on June 20, 1994. On July 18, 1994, petitioners filed a timely Notice of Appeal as to the February 1, 1994, February 3, 1994, and June 20, 1994 orders and judgments. 186a-187a. On July 22, 1994, petitioners filed an Amended Notice of Appeal to include appeal of the July 15 judgment, which they did not receive until after the filing of the initial Notice of Appeal. 189a-190a.

STATUTORY PROVISIONS AT ISSUE IN THIS CASE

Fed. R. Civ. P. 59(e), which provides that a "motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment."

Fed. R. App. P. 4(a)(4), which provides, in relevant part:

> If any party files a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:
>
> . . .
>
> (C) to alter or amend the judgment under Rule 59;
>
> . . .
>
> A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding.

STATEMENT OF THE CASE

On April 23, 1993, petitioners filed this facial challenge to the 1993 amendments to the Utah Abortion Law (Utah Senate Bill 60 of 1993) (hereinafter "SB 60"), which

mandates that at least twenty-four hours before a woman may obtain an abortion she must receive state-mandated oral information and must be offered state-prepared written information, which is designed to dissuade her from terminating her pregnancy. *See* Utah Code Ann. §§ 76-7-305 (Michie 1995 Repl.). By its terms, provisions of SB 60 do not apply in a "medical emergency." Utah Code Ann. § 76-7-305(2) (Michie 1995 Repl.). A preexisting section of the Utah Abortion Law provides that a portion of SB 60 does not apply in a "serious medical emergency." Utah Code Ann. § 76-7-315 (Michie 1995 Repl.).

On April 26, 1993, petitioners moved for a temporary restraining order ("TRO") and/or a preliminary injunction against SB 60, which was scheduled to take effect on May 3, 1993. Petitioners alleged that the Act's mandatory delay and biased information provisions unduly burdened women's right to choose abortion in Utah,[1] and that the conflicting emergency exceptions were unconstitutionally vague. District Judge Dee Benson referred this matter to Magistrate Judge Ronald Boyce, who held a hearing on petitioners' TRO motion on April 30, 1993. On that date, Judge Benson entered a 10-day TRO against enforcement of SB 60, and on May 12, 1993, he extended the TRO for an additional ten days. On May 25, 1993, at the urging of Judge Benson, the petitioners stipulated to waive attorney's fees for prevailing on the TRO motion in exchange for the agreement of respondents Michael Leavitt and Jan Graham (hereinafter, "defendants") not to enforce SB 60 during the

[1]This case was the first federal court challenge to a restrictive abortion law filed after this Court ruled in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), that the "undue burden" standard for reviewing abortion restrictions had replaced the nineteen-year old strict scrutiny standard established in Roe v. Wade, 410 U.S. 173 (1973). See Casey, 505 U.S. at 876 (joint opinion).

pendency of the litigation. On November 10, 1993, after review of an extensive record of affidavits submitted by both sides, Magistrate Judge Boyce issued a Report and Recommendation ("R&R"), recommending that SB 60 be interpreted "in keeping with the judicial policy of avoiding constitutional burdens and giving the statute the construction that comports with constitutional standards." 81a-82a. Judge Boyce interpreted SB 60 to mean that the mandated oral information could be given by telephone or other electronic means so that women seeking abortions in Utah need not make two separate trips to a health care facility in order to obtain the procedure. 81a. With respect to the conflicting emergency exceptions, Judge Boyce found: "[t]his part of the Utah statute is *badly* drafted," and "[c]ontrary to the defendants' claim there is an arguable ambiguity" in the provisions. 66a (emphasis in original). The R&R concluded that:

> this provision, if it could be concluded to be contrary to ... [the] vagueness concerns [in *Colautti v. Franklin*, 439 U.S. 379 (1979)], is easily severable from the rest of the statute and § 76-7-315 as it applies to § 76-7-305(2) could simply be declared void leaving §§ 76-7-305(2) as the applicable provision. The rest of S.B. 60 would not be effected [sic]. This however is not a necessary conclusion.

68a. Nevertheless, the R&R recommended that the conflicting emergency exceptions were permissible.

On November 29, 1993, petitioners filed their objections to the R&R, stating that so long as the district court adopted the Magistrate's interpretation that the pre-abortion oral information need not be given in a face-to-face meeting they would not continue to contend that SB 60 was

an undue burden in the context of this facial challenge. Petitioners objected to the Magistrate's recommendation that the conflicting emergency exceptions survived a vagueness challenge.

On January 28, 1994, District Judge Benson held a hearing on the R&R, at which time he excoriated petitioners and their counsel for having filed this lawsuit, and questioned the relationship between petitioners and their counsel. On February 1, 1994, the district court entered an Opinion and Order, which adopted the R&R, lifted the temporary injunction against enforcement of SB 60, and dismissed petitioners' claims. Judge Benson further found that petitioners' case was frivolous and had been brought in bad faith, and on that basis he *sua sponte* sanctioned petitioners by ordering them to pay defendants' costs and attorney's fees. 128a. On February 3, 1994, a judgment was entered on this opinion. 129a. The District Court did not give petitioners any opportunity to respond to the sanctions against them.

On February 14, 1994, petitioners timely moved to alter or amend the February 3 judgment pursuant to Rule 59(e). Petitioners' motion reargued the merits of their case in an attempt to show that the case was neither frivolous nor brought in bad faith. The motion was based in substantial part on two federal appellate decisions issued after February 3, 1994, relating to the constitutionality of mandatory delay abortion laws. *See Planned Parenthood v. Casey*, __ U.S. __, 114 S. Ct. 909, 911 (1994) (Souter, J., in chambers); *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 532 (8th Cir. 1994). To demonstrate the merits of petitioners' claim that SB 60's conflicting emergency exceptions are unconstitutionally vague, petitioners brought to the district court's attention a speech made by defendant Utah Attorney General Jan Graham at the American Bar Association

Annual Meeting in which she used the ambiguity in the conflicting emergency exceptions as an example of poor legislative drafting. Petitioners also argued that the district court had, by adopting the R&R and thus the interpretation of SB 60 permitting the information to be given by telephone, given petitioners a substantial benefit, and thus the case could not be deemed frivolous. Several declarations were submitted demonstrating benefits petitioners received from the litigation.

In their opposition papers, defendants also reargued the merits of the case, claiming, *inter alia*, that petitioners' case was frivolous because the standard for facial challenges set forth in *United States v. Salerno*, 481 U.S. 739, 745 (1987), rather than the undue burden standard set forth in *Casey*, should be applied in the case.

On June 20, 1994, the district court entered a 61-page Memorandum Decision and Order, denying petitioners' motion to reconsider the February 3 judgment. 130a. The June 20 decision reviewed in detail the merits of petitioners' case, discussing: the limitations on Article III courts (132a-133a); the history of SB 60 (138a-145a); the procedural background of the instant litigation (145a-148a); the standard a federal court must apply in reviewing an enactment restricting women's access to abortion (149a-152a); the evidence adduced at trial (152a-153a); why petitioners did not meet their burden of proving that SB 60 is an undue burden (153a-160a); and why petitioners did not meet their burden of proving that the conflicting health exceptions were unconstitutionally vague (160a-162a). The district court also "clarified" the substantive holding of its February 1 opinion by indicating that even though it adopted the R&R, it did not necessarily adopt the R&R's interpretation of SB 60 permitting the state-mandated information to be given by telephone (165a-170a). The

district court awarded defendants $72,930.00 in attorney's fees and $477.40 in costs for the time spent defending the litigation. 184a. Finally, the district court -- again *sua sponte*, and again without providing an opportunity for response -- sanctioned petitioners for filing the Rule 59(e) motion, and ordered them to pay defendants' costs in opposing that motion. 184a-185a. On July 15, 1994, the district court entered a judgment in favor of defendants and against petitioners for $81,477.50 in attorney's fees and $477.40 in costs. 188a.

On July 18, 1994, within 30 days after denial of the Rule 59(e) motion, petitioners filed their Notice of Appeal of the February 1 Opinion and Order, the February 3 judgment, and the June 20 decision denying their Rule 59(e) motion. 186a. On July 22, 1994, petitioners filed an Amended Notice of Appeal to include appeal of the July 15 judgment. 189a. Petitioners did not receive a copy of this judgment until after the filing of the initial Notice of Appeal.

On August 4, 1994, the court of appeals *sua sponte*, in an order signed by the deputy clerk, ordered petitioners and defendants to file simultaneous briefs regarding:

> Whether the July 18, 1994 Notice of Appeal was timely filed as to the district court's February 1, 1994 Opinion and Order and as to the district court's February 3, 1994 Judgment entered February 4, 1994? *See* Fed. R. App. P. 4(a)(1); Pennsylvania Nat. Mut. v. City of Pittsburg, Kans., 987 F.2d 1516, 1518 (10th Cir. 1993); *see also* Budinich v. Becton Dickinson & Co., 486 U.S. 196, 202-203 (1988) (a decision on the merits is a final decision under 28 U.S.C. § 1291 whether or not there remains for adjudication questions related to attorneys' fees).

The order tolled the time for briefing the merits of the appeal pending further order of the court. In their brief on the jurisdictional issue, defendants took no position on the appropriate outcome of the jurisdictional question.

On February 9, 1995, the court of appeals ordered briefing on the merits to proceed, stating that the jurisdictional issue would be submitted to the panel selected to handle the appeal. On November 22, 1995, the court of appeals (without oral argument) dismissed petitioners' appeal insofar as it related to the conflicting emergency exceptions to SB 60.[2] 191a. It also remanded the remainder of the case for reconsideration in light of *Jane L. v. Bangerter*, 61 F.3d 1505, 1513-18 (10th Cir. 1995) (reversing district court sanctions against plaintiffs in abortion case). The district court has taken no further action with respect to the case.

On January 25, 1996, the court of appeals denied petitioners' petition for rehearing and suggestion for rehearing en banc. 201a.

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[2]This was the only merits issue appealed by petitioners.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit's order dismissing petitioners' appeal as untimely filed is contrary to this Court's decision holding that post-judgment motions that are significantly intertwined with the merits of the judgment are Rule 59(e) motions. *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 174-76 (1989). The question presented is vitally important to appellate courts and to litigants because its resolution directly affects federal appellate jurisdiction.

The Tenth Circuit is now in conflict with all the other circuits that have reached the issue. As other circuits have recognized, debatable post-judgment motions should be deemed Rule 59(e) motions to avoid harsh results and unseemly and expensive jurisdictional wrangling. Moreover, to protect the integrity of the federal appellate process, appellate courts should not seize upon a procedural ambiguity to avoid reaching sensitive statutory or constitutional issues.

I. THE TENTH CIRCUIT'S RULING CONFLICTS WITH A CONTROLLING DECISION OF THIS COURT, OR, ALTERNATIVELY, DECIDES AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

A. The Tenth Circuit Decision Conflicts With This Court's Controlling Precedent

In *Osterneck*, this Court sharply distinguished a post-judgment *request* for attorney's fees which raises "issues wholly collateral to the judgment in the main cause of action," from post-judgment motions that are "intertwined in

a significant way with the merits of the plaintiff's primary case." 489 U.S. at 175-76 (citation omitted). No request for attorney's fees is involved in our case. Petitioner's post-judgment motion was an attack on the district court's order imposing heavy sanctions upon petitioners for supposedly filing a frivolous action. Petitioners' post-judgment motion went to the heart of the merits of the judgment. Like the motion in *Osterneck* for discretionary post-judgment interest, petitioners' motion required the district court to "re-examine . . . matters encompassed within the merits of the underlying action." 489 U.S. at 176.

The district court itself recognized that fact in its lengthy memorandum decision modifying and "clarifying" its prior judgment. The district court could not reconsider the portion of the judgment imposing sanctions for filing a legally frivolous case without reexamining the merits of the case. Therefore, under *Osterneck*, petitioners' motion for reconsideration of the sanctions was a Rule 59(e) motion that tolled the time for filing their appeal on the merits.

Instead of following *Osterneck*, the Tenth Circuit relied on *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451-52 (1982) (a request for attorney's fees under § 1988), *Buchanan v. Stanships, Inc.*, 485 U.S. 265, 268 (1988) (post-judgment costs), and *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988) (question was whether the judgment was final under 28 U.S.C. § 1291 during pendency of attorney's fees motion). None is on point.[3]

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[3]White arose because there was then no federal rule regarding the time for filing a motion for attorney's fees under 42 U.S.C. § 1988. The Federal Rules were thereafter amended (see Fed. R. Civ. P. 54 (d)(2)(B)), and the new rule now supersedes White. See Advisory Committee Notes to Rule 54. As this Court pointed out in Osterneck, (continued...)

B. Alternatively, This Is An Open Issue That The Court Should Decide

Even if this Court were to conclude that the *Osterneck* does not control here, this case would present an open issue that the Court should decide. In deciding *Osterneck*, *White*, *Buchanan*, and *Budinich*, this Court recognized the central importance of establishing clear rules for when a judgment is final for purposes of appeal. If *Osterneck* does not supply that rule here, this Court should grant the writ and decide what rule does apply so that litigants in future cases are not deprived of their appeals, as petitioners have been by the Tenth Circuit.

In addition, this Court should grant the writ because the Tenth Circuit's ruling will lead to duplicative and piecemeal appeals. Pursuant to the Tenth Circuit's ruling, petitioners were required to have appealed from the merits portion of the February 3 judgment before their Rule 59(e) motion was decided, and then to have appealed four months later from the sanctions portion of the same judgment. Had petitioners done so, the Tenth Circuit would have had to decide the merits of the appeal separately from deciding whether the case was legally frivolous. Because those issues demand

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[3](...continued)
White and Buchanan are limited to motions which raise "issues wholly collateral to the judgment in the main cause of action." Osterneck, at 175. In Budinich, this Court held that litigants seeking fees under section 1988 need not do so within the time period provided by Rule 59(e). The Court explained that the determination of attorney's fees is not part of the merits because it "will not alter the order [ending litigation] or moot or revise decisions embodied in the order." 486 U.S. at 199. This reasoning plainly does not apply here where petitioners' motion specifically sought an alteration and revision of the February 3 judgment.

virtually the same legal and factual analysis, the Tenth Circuit's ruling will cause redundant appeals in that circuit.

II. THE COURT OF APPEALS DECIDED AN ISSUE OF IMPORTANCE IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

Every court of appeals other than the Tenth Circuit to address the question presented here has held that a motion to alter or amend a judgment tolls the time to appeal from that judgment, even if it relates to attorney's fees, so long as the motion is not an initial application for fees.

In a case nearly identical to this one, *Ramsey v. Colonial Life Ins. Co. of Am.*, 12 F.3d 472 (5th Cir. 1994), the Fifth Circuit held that a plaintiff's motion to reconsider a judgment in his favor on the merits, but which denied him attorney's fees for lack of "bad faith," was a Rule 59(e) motion. The Court held:

> We believe that the motion to reconsider attorney's fees under consideration here is distinguishable from both *White* and *Budinich* because the motion, unlike the cases presented to the Supreme Court, is not an original request for attorney's fees. Instead we have a case in which the district court, as part of its final judgment on the merits, has already passed on and denied the plaintiff's motion for attorney's fees. Thus, *plaintiff's motion was not an original request for fees but instead was a motion for reconsideration of a final judgment where the subject matter of that motion happened to focus on the question of attorney's fees.*

12 F.3d at 476-77 (emphasis added) (footnote omitted). Here, as in *Ramsey*, petitioners sought reconsideration of an

integrated judgment that addressed the merits of the case as well as sanctioning petitioners for filing it.

The Tenth Circuit tried unsuccessfully to distinguish *Ramsey* by saying that it involved reconsideration of a judgment *denying* attorney's fees, rather than, as here, granting them. The supposed distinction is legally irrelevant. In fact, *Ramsey* was based on the fact that "attorney's fees [we]re one part of an integrated judgment on the merits," 12 F.3d at 477, and not whether the motion related to an award or denial of attorney's fees. If the *Ramsey* motion had succeeded, quantification of fees would have been necessary, as they were here. According to the Tenth Circuit, however, if the *Ramsey* movants had prevailed on their Rule 59(e) motion, that motion could no longer have been considered a Rule 59(e) motion, and it would not have tolled the time for appeal. The result makes neither legal nor common sense.

A conclusion similar to that in *Ramsey* was reached by an *en banc* panel of the United States Court of Appeals for the Sixth Circuit in *Penland v. Warren County Jail*, 759 F.2d 524 (6th Cir. 1985) (*en banc*). The Sixth Circuit held that a post-judgment motion for attorney's fees was a Rule 59(e) motion because the plaintiff initially requested attorney's fees in the complaint and the magistrate denied the request for fees in the judgment. Thus, the plaintiff's application for fees was not an "initial" request, such as in *White*. *See Penland*, 759 F.2d at 527; *accord Samuels v. Am. Motors Sales Corp.*, 969 F.2d 573, 577-78 (7th Cir. 1992) (a motion seeking reconsideration of the amount of attorney's fees awarded was a Rule 59(e) motion because it

was not an initial request for fees).[4]

Circuit's other than the Tenth have applied an extremely liberal standard when characterizing post-judgment motions as encompassed by Rule 59(e).[5] Thus, in *Herzog Contracting Corp. v. McGowen Corp.*, 976 F.2d 1062 (7th Cir. 1992), the court articulated the reason why post-judgment motions should be treated as Rule 59(e) motions regardless of how the motion is framed:

> Debatable cases are to be shoveled into the substantive bin in order to avoid the "endless hassles over proper characterization" that would ensue if appellees thought they had a good shot at defeating an appeal by pointing to ambiguities or irregularities in a postjudgment motion that the appellant had thought postponed the deadline for his appeal -- indeed postponed the earliest time at which he could appeal.

976 F.2d at 1065 (citing *Western Indus., Inc. v. Newcor Canada, Ltd.*, 709 F.2d 16, 17 (7th Cir. 1983) (per curiam)). *See also Harborside Refrigerated Services, Inc. v. Vogel*, 959 F.2d 368, 372 (2d Cir. 1992) ("a motion which calls into question the correctness of a district court judgment is

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[4]Cf. Varnes v. Local 91, Glass Bottle Blowers Ass'n of the United States and Canada, 674 F.2d 1365, 1369 (11th Cir. 1982). The Eleventh Circuit held that an application for attorney's fees is not "collateral" to the merits when the basis for attorney's fees is the adversary's alleged bad faith.

[5]The Tenth Circuit held, in effect, that petitioners' motion to alter or amend the judgment was not a Rule 59(e) motion. Had it been a Rule 59(e) motion, it would necessarily have tolled the time to appeal. See Fed. R. App. P. 4(a)(4).

the functional equivalent of a Rule 59(e) motion"); *Finch v. City of Vernon*, 845 F.2d 256, 259 (11th Cir. 1988) (post-judgment motion that raises "a substantive issue going to the heart of the judgment" and filed within ten days thereof is a Rule 59(e) motion); *Elias v. Ford Motor Co.*, 734 F.2d 463, 466 (1st Cir. 1984) (motion to change the rate of prejudgment interest awarded from 8% to 12% is a Rule 59(e) motion subject to ten-day requirement because the relief sought in the motion "would necessarily require a change in the judgment").

CONCLUSION

To bring the Tenth Circuit into harmony with the decisions of this Court and other circuits, as well as to settle a question that is vitally important to ensuring uniformity in the exercise of appellate jurisdiction, petitioners respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

UTAH WOMEN'S CLINIC, INC.,
Plaintiff(s),
vs.

MICHAEL LEAVITT, et al.,
Defendant(s).

Case No. 93-C-407 B

REPORT AND
RECOMMENDATION

The plaintiff filed the instant action challenging the 1993 amendments made by the Utah Abortion Act Revision, Senate Bill (S.B.) 60, effective May 3, 1993 (File Entry 1). The revision legislation made amendments and additions to the provision of the Utah Criminal Code, Title 76, Chapter 70 relating to abortion. The case has been referred to the magistrate judge under 28 U.S.C. § 636(b)(1)(B) (File Entry 8). The parties have also consented to procedures set forth by the district court for resolution of the issues in this case and for hearing before the magistrate judge.

The plaintiffs made a motion for a temporary restraining order. After hearing and on recommendation of the magistrate judge a restraining order was entered and extended by the District Judge (File Entry 30). The parties entered into a stipulation approved by the district court to continue the restraining order pending a hearing for a temporary injunction order and a decision on plaintiffs' request for injunctive relief (File Entry 37). The district court then determined that pursuant to Rule 65(a)(2) F.R.C.P. the trial on the merits of the request for injunctive relief would be advanced and consolidated with the hearing

for preliminary injunction and heard initially before the magistrate judge (File Entry 36, Order of May 24, 1993). The parties agreed to this procedure.

In the meantime, following the hearing and ruling of the court on plaintiff's motion for a temporary restraining order, the plaintiffs, at the direction of the court, filed an amended complaint (File Entry 23). The amended complaint was brought by plaintiff women's clinics, physicians, abortion and reproduction services counselors, women's reproduction services providers and Sarah Roe, a thirty year old woman who was seven weeks pregnant at the time (¶ 24). The clinics and physicians perform abortions and are concerned about potential civil and criminal responsibility under the Utah Abortion Act Revision.

Defendants are Utah State officials. The action was brought as a class action pursuant to Rule 23(b)(1)(A),(b)(2) F.R.C.P. The class was certified on stipulation of the parties to encompass:

> "All women who currently, or will in the future, seek an abortion in the State of Utah, and all women who currently, or who will in the future, seek or obtain information regarding their options with respect to pregnancy, when such information is required to be given by Utah Code Ann. § 76-7-305 and § 76-7-305.5, as amended by Utah Senate Bill 60 1993" [Fiftieth Utah Legislature].

The plaintiffs' amended complaint challenges the provisions of S.B. 60 providing for a twenty-four (24) hour waiting period for an abortion except in the case of those women who have a medical emergency as that term is defined in the Act. Second, plaintiffs contend the medical emergency exception to the waiting period is unworkable

because it conflicts with other portions of the act. The plaintiffs contend the effect of the conflicts is of such a magnitude that the act is not only confusing in application but also unconstitutionally vague. The plaintiffs contend the twenty-four hour waiting period for an abortion under Utah law, when considered with the requirements of mandatory advice and other categories of information required to be given or made available to a woman considering an abortion, unduly burdens the right of a pregnant woman to an abortion and thereby violates the due process clause of the Constitution of the United States. The plaintiff also challenges the provisions regarding mandatory and discretionary information to be given by an abortion provider or other authorized person as being unfairly biased. Also, as to the information to be provided by the Utah Department of Health, which are materials to be made available to a woman if she wishes to consider them before an abortion, plaintiffs claim the material is inaccurate. It is contended this constitutes an undue burden on a woman's Constitutional right to an abortion.

Plaintiffs have claimed the Utah abortion law violates a woman's right to liberty and privacy under the United States Constitution,[1] is unconstitutionally vague, violates the right to interstate travel, free speech, family privacy and equal protection of the law. These arguments have not been developed beyond the due process arguments.

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[1]Plaintiffs allege violations of the First, Fourths Fifth, Ninth and Fourteenth Amendments. The full relationship of the Utah statutes to these rights has not been explored by plaintiffs. In their submissions the parties have fully addressed the due process privacy right of a woman to choose an abortion as provided for in the Fourteenth Amendment to the Constitution of the United States. This is the only constitutional provision relevant to this matter.

The district court in its order directing that the preliminary injunction and final resolution on the merits be heard together, pared the issues down to those which have the most significance. Three issues were identified as warranting the specific attention of the court and were to be considered by the magistrate judge at the consolidated hearing for injunctive relief. They are generally stated as (File Entry 36):

> a. The constitutionality of the Utah 24 hour waiting period for an elective[2] abortion.
>
> b. The constitutionality of the Utah medical emergency exceptions to the waiting period for an elective abortion.
>
> c. The constitutionality of the Utah abortion statutes' requirement that certain information be provided to every woman who seeks an elective abortion.

The parties, who agreed to the formulation were allowed to present factual submissions in the form of affidavits and allied material that would bear on the constitutional issues (File Entry 36, p.2). The factual submissions are not as to the effect of the statute on any particular woman who may wish an elective abortion in Utah, but are submissions on the effect and import of the Utah law on the class and the plaintiffs serving the class. Although some submissions recount individual experiences or concerns of women, they are relevant only in the context of the effect of the Utah law. The submissions are to allow the court to assess whether the Utah law constitutes an

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[2]Elective abortion means an abortion based on the choice of a woman as distinct from a spontaneous abortion. (Letter to counsel June 2, 1993).

undue burden on a woman considering an abortion or is otherwise unconstitutional.

Factual Submissions

Plaintiffs' Factual Submissions

Because plaintiffs have the burden of establishing the unconstitutionality of S.B. 60 and because it is more convenient, the plaintiffs' combined factual submissions will be discussed first and then the combined factual submissions of defendants.

Pursuant to the court's order the plaintiffs have submitted 42 initial declarations in support of their request for a permanent injunction against enforcement of S.B. 60 (File Entry 38). Not all the matter submitted is relevant material or helpful, however, the court has considered the information provided to the extent it advances the inquiry.

The fourth declaration of plaintiff Alissa Porter, (File Entry 38, Exh. 1), the Administrator of the plaintiff Utah Women's Clinic, states that the clinic provides a wide range of gynecological services including abortions up to 21 weeks from the last menstrual period (LMP). The clinic employs 4 physicians, 1 nurse practitioner, 2 medical assistants, and 8 support staff and makes 900 client contacts per month. The clinic is a licensed abortion clinic under Utah Administrative Code R432-600 (1992). It operates within National Abortion Federation (NAF) standards. Counseling on pregnancy is non directive and abortions are performed five days a week. The abortions at the clinic make up 76% of the abortions conducted in Utah each year. 928 of the abortions are performed before the 15th week following the last menstrual period (LMP). Only 3% are after the 18th week. Abortions after the 2lst week are not

performed by the clinic. Less than 1% of patients require hospitalization. The methods and procedures for the abortions at the clinic are set forth. Depending on the length of pregnancy an abortion may be performed in one day or the patient may be required to return a second or third day. The price of the abortion goes up according to the length of the pregnancy and includes counseling and follow-up visits. Many patients have an income below $22,000 per year. 10% of the patients have trouble paying for services. The ethnic make up is 8% Hispanic, 1% Asian, 5% Pacific islander, 2% black, and 1% American Indian. The clinic treats patients from outside the state and 54% of the patients are from Salt Lake County where the clinic is located. 18% come from areas requiring in excess of two hours travel, and 16% in excess of three hours travel. Most patients are single or separated. Interviews with a counselor are required. In 1992 clinic staff offered Utah Department of Health (UDH) printed materials to 100% of the patients, 97% declined to view the material. Ms. Porter has set out her fears as to the detrimental effect of S.B. 60 on the clinic and its patients. Part of her concern is a belief the legislation would require two trips to the clinic by a woman considering an abortion. The procedures may be one, two, three or four days depending on the circumstances. Porter fears this could be enhanced under S.B. 60. She believes the act will require physicians to spend more time in counseling and less time performing abortions. She also contends the state materials (UDH) for consideration by the woman considering an abortion are false. She sets forth her concerns as to transportation and the costs the 24 hour waiting period under S.B. 60 may have on patients. Many of the statements are in the form of subjective opinion and personal speculation.

A declaration of plaintiff Laurel A. Shepherd, M.D. was submitted. Dr. Shepherd specializes in family planning and

gynecologic services. Dr. Shepherd performs abortions up to 15 weeks of pregnancy and patients come from all over Utah. The doctor performed 671 abortions in 1992 and has performed 513 abortions in 1993. The Doctor opines that a large portion of women will be prevented or substantially interfered with in their effort to obtain an abortion. The rate of abortion deaths in Utah is zero whereas the rate of "morbidity"[3] for childbirth is approximately 30%. Dr. Shepherd asserts that S.B. 60 will require the giving of misleading, incomplete, false, and inappropriate information. Some of the medical information required to be given a patient by S.B. 60 is already being given, but it is suggested that some of the information will be irrelevant, harmful or unnecessary. Dr. Shepherd believes the requirements of "informed consent" under S.B. 60 are "burdensome, biased and often impossible to comply with." Dr. Shepherd has provided information as to the practices followed with patients and questions how this may be influenced by S.B. 60. Dr. Shepherd believes the 24 hour waiting period would burden women who have to travel long distances to the clinic. Fears about harassment by anti-abortion protesters are also speculated about. Dr. Shepherd also expresses concern about the "medical emergency" provisions of S.B. 60 and considers them vague.

A submission was presented from Dr. Madhuri Shah, M.D., a physician specializing in gynecology employed at the Utah Women's Clinic. Dr. Shah performs abortions up to 21 weeks LMP and different procedures are utilized depending on the length of pregnancy. Dr. Shah personally performed 1,990 abortions in 1991, 1,534 abortions in 1992 and has performed 625 abortions so far in 1993. The declaration recites that under S.B. 60 women will be

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[3]Morbidity and death are not the same.

prevented from obtaining abortions or substantially interfered with in their efforts. Much of Shah's submission is redundant with other submissions. Dr. Shah asserts S.B. 60 will cause irreparable harm to physicians and intrude on medical ethics. The doctor indicates concern with the state mandated information although acknowledging that some of the information would be provided without a statute. Counseling for women considering abortion is done in association with counselors and by the doctor. Dr. Shah states if information is given the woman under the Utah law by a referring physician, Dr. Shah would have to reinform the woman to make sure it was accurate. The doctor hesitates to rely on other health practitioners. Dr. Shah believes some of the information could cause emotional distress. Shah also expresses concern as to the delays and problems the 24 hour waiting period may require patients to endure. Shah's declaration also contends the medical emergency exception is vague and unclear.

Wendy Edwards, counseling supervisor at the Utah Women's Clinic, describes the manner in which counseling is performed at the clinic. This includes the abortion procedure, fetal development, moral and religious conflicts, abortion risks and complications. Needs of patients in special circumstances are given appropriate attention. Edwards states she fears criminal prosecution under the statute. This expressed fear is subjective, self serving, and of no evidentiary value. Edwards expresses concern over the supplemental printed material concerning abortion alternatives and concludes it may be false and misleading.

Denise Defa, a plaintiff and administrator as well as co-owner of Wasatch Women's Center, has submitted a declaration. The Center provides abortion services among its other services. Counseling and adoption information is provided to women at the center. Abortions are performed

up to 14 weeks LMP. 10% of the women are from rural areas, 90% from cities or towns. The average distance that women travel to the clinic is 40 to 50 miles, some have to travel 250 miles and some are from out of the state. Ms. Defa has expressed concern about the mandated counseling and whether a video tape would suffice. If the physician performing the abortion has to provide the information, Defa states it will take additional time. Ms. Defa has concern as to whether patients will be required to make two trips to the Center. Concern is expressed as to traveling demands and expenses that could result from the 24 hour waiting period. It is opined that this period might create financial problems and also exacerbate concerns of patients over privacy. Ms. Defa also expressed concerns over the vagueness of the medical emergency exception dispensing with the twenty-four hour waiting period.

Dr. William R. Adams, M.D., is the medical director of the Wasatch Women's Center and co-owner. Dr. Adams specializes in Obstetrics and Gynecology and is Board certified. He is the only physician at the Wasatch Center. He works at the center three days a week for two hours and two days a week for four hours. The time is primarily spent performing abortions and conducting examinations. He performs about 1,000 abortions a year at the Wasatch Center. Dr. Adams states he fears prosecution under the new law.[4] He would be hesitant to rely on an outsider giving advice for fear of criminal liability.[5] Wasatch Center does

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[4]This is subjective hysteria or argument. During oral argument, counsel for plaintiffs admitted no physician has been prosecuted in Utah for performing an abortion since Roe v. Wade, 410 U.S. 113 (1973).

[5]This fear is probably unfounded in light of the element requirements of the criminal law requiring a culpable intent.

not have qualified people other than Dr. Adams to provide necessary advice and is unsure if a video tape would suffice. Additional time giving advice will be required. He believes a waiting period and biased counseling will lead to a significant drop in the number of women who can obtain abortions. Adams also believes some of the information which is to be provided is false. Additional waiting time may be required. Costs of an abortion will be increased. Dr. Adams is also concerned this may impede the willingness of a woman who has undergone an abortion to avail herself of a follow-up examination.

Dr. Edward R. Watson, M.D., an employee of a women's clinic in Grand Junction, Colorado, and a plaintiff in the case does perform abortions up to 22 weeks of pregnancy. Some women come to his clinic in Grand Junction from Utah. The Grand Junction Women's Clinic is owned by the Utah Women's Clinic. He refers his patients to Utah when he is unable to provide services. This is approximately fifty abortions a year. He frequently refers women who are more than twelve weeks pregnant to the Utah Women's Clinic. This requires a two day procedure. Dr. Watson is not licensed in Utah, although he does not indicate whether he could be licensed in Utah. Watson reiterates the same concern as the previous physicians have expressed about the requirements of S.B. 60.

Kirtly Parker Jones, M.D., an obstetrician-gynecologist, and reproductive endocrinologist, is Board Certified in obstetrics and gynecology. Jones is the medical director of the Fertility Center at the University of Utah School of Medicine. He is the medical director of Planned Parenthood of Utah. Jones has made a declaration that about 0.1% of deliveries are complicated by a severe form of pregnancy-induced hypertension. This is called eclampsia. Dr. Jones has also provided information on various other pregnancy

related disorders, such as hemorrhaging, diabetes, ectopic-pregnancies (fertilized egg is implanted outside the womb in various sites), amniotic fluid embolism, pulmonary embolism and disseminated intravascular coagulation. In addition he observes 25% of the women who deliver babies by cesarean section are exposed to significantly higher risks of death and other complications than women who deliver vaginally. Pregnancy can cause new diseases in women or aggravate preexisting illnesses. In Dr. Jones' opinion any unwanted pregnancy is more risky in carrying the pregnancy to term and that pregnancy is more risky than abortion (3 deaths per 100,000 pregnancies). In the Doctor's opinion a twenty-four hour waiting period could increase risks to a woman's health and would not inform her opinion. Multifetus pregnancies have increased problems and a woman many choose selective terminations. Fetal anomalies raise special problems due to the fact that they may not be diagnosed in some patients until the second trimester of pregnancy. Jones believes the 24 hour period does not serve a legitimate purpose in such cases. Jones questions the efficacy of the mandatory information requirement and the twenty-four hour waiting period.

Dr. Stanley Henshaw, Ph.D, deputy director of the Alan Guttmacher Institute (AGI) in New York City which collects data on family planning and abortion services in the United States indicates it of women in the United States having abortions become pregnant due to rape. 57% of all pregnancies were unplanned. Fifty percent of all unwanted pregnancies ended in abortion and 29% of all pregnancies also resulted in abortion. In Utah in 1990, 4,688 abortions were performed, 98% in Salt Lake County. 32% were on women outside the county of their residence. 726 abortions were performed for women who resided outside the State of Utah. Only two counties in Utah have abortion providers and about 1,000 women who have abortions live in the

other counties. Seventeen counties do not have resident obstetricians or gynecologists. In four counties there are no general or family practitioners. Travel for women in Utah seeking abortions in 1990 required 21 women to travel 200 miles, 104 between 100 and 199 miles. Henshaw-also has provided an opinion as to the effect the 24 hour waiting period may have on some women. This is suggested to be greater for low income women.

Jane Hodgson, M.D., a clinical associate professor in obstetrics and gynecology at the University of Minnesota, states that increased travel, fear of disclosure or harassment may make it difficult for women to obtain abortions in Utah. There is no indication Dr. Hodgson has any experience with travel or other circumstances in Utah. Dr. Hodgson has outlined the medical complications that can attend pregnancy which are generally the same as those identified by Dr. Jones. In addition, special physical risks for teenagers who are pregnant are noted. Teenagers have a higher risk of toxemia, complications from premature birth, and anemia. Other problems of growth and skeletal impact can occur. The child of a teenager may need additional medical care. There are of course psychological impacts of such pregnancy. Correspondingly, there are greater risks from a full term pregnancy for women over age 35. Abortions are statistically safer for women than pregnancy. Dr. Hodgson has provided general information not tailored to the statute in question or impacts of or risks from abortion. Dr. Hodgson examined some materials from the Utah Department of Health which might be made available to women who wish to examine them. She indicates the materials selectively omit relevant information as to risks

from pregnancy.[6] Dr. Hodgson also challenges the accuracy of certain statements in the Utah Department of Health (UDH) materials e.g. length of fetus and states the photographs of the fetus are magnified. The materials referred to are not the latest UDH materials. The information is also challenged as being misleading as to fetal viability and on the possible emotional complications of abortion. These deficiencies support a conclusion that the information will not assure informed consent.

Dr. Lenore E. Walker, Ph.D., is a clinical psychologist who has counseled and treated numerous victims of rape and incest. She has submitted an opinion that the Utah Abortion Act Revision will create a substantial obstacle for battered women and abused women. Pregnancy is often a flashpoint for battering violence. She argues the 24 hour waiting period could require two trips for battered women and create stress. Battered women are sometimes psychologically vulnerable and the counseling requirements may aggravate that condition. Such women may not return to the clinic to have an abortion.

Jamie McDonald, a genetics counselor at the University of Utah, has provided information on genetic and developmental anomalies. It is asserted that the 24 hour waiting period will cause mental and physical distress of women who would terminate pregnancies because of fetal abnormalities. It is noted the degree of certainty with regard to diagnosis and prognosis in relation to such matters can vary tremendously. Additional testing may be required. McDonald contends women who arrive at an abortion clinic have made up their mind to have an abortion and the

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[6]This is not a statutory requirement. As will be seen, a physician may add any other information he or she deems appropriate to the decision to abort.

waiting period unnecessarily delays the abortion. It is contended the mandatory counseling could increase emotional distress which may deter women from having an abortion. Other information submitted by McDonald is anecdotal or redundant.

Letitia Archuleta, M.D., is employed at the Utah Women's Clinic and provides gynecological care and contraceptive counseling. She opposes the 24 hour waiting period for Latin and Native American women because of financial problems. Part of her assessment is based on the possibility of additional expense by having to make two trips. The opinion points out cultural inhibitions to abortion that may exist among such women. Contrary to Dr. Archuleta's assessment, however, there is no "two day" requirement in the Utah law.

Kerrie Galloway is the executive director of Planned Parenthood Association of Utah (PPAU). It does not perform abortions but does provide counseling and makes referrals to abortion providers in Utah and Colorado. The two abortion providers in Utah who are the two plaintiff clinics, are referred to patients for their utilization. Galloway has provided information to the court on twelve health districts in Utah and counseling and other services provided by PPAU.

Dr. John C. Carey, M.D., specializes in dysmorphology and the diagnosis and treatment of birth defects. He has reviewed UDH materials, the last dated April 1993 which are materials that a woman may examine if she wishes.[7]

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[7]The April 1993 materials are no longer the materials UDH proposes to use to meet the supplementary non-mandatory information requirements of S.B. 60. Therefore, the submission of Dr. Carey is (continued...)

Dr. Carey believes the materials are not balanced, are confusing, and do not provide purpose or organization for the woman who uses them. He also states there are a number of errors and the information is misleading because LMP or fetus development is not identified in accurate periods. The length of the fetus is not properly described in the materials.

Claire O. Leonard, M.D., a practitioner in genetics and pediatrics in Utah, contends the UDH materials for discretionary viewing are biased and misleading and will not provide informed consent, and will confuse or mislead. The materials referred to are not necessarily the last materials proposed to be used by the UDH. Variations in fetal development are not taken into account or individual differences recognized in the material Leonard examined. The material--is confusingly presented. The doctor is apparently referring to the April 1993 material. Embryo, child and fetus are used indiscriminately. The materials do not provide an adequate comparison of risks of childbirth and abortion.[8] The materials are characterized as inaccurate and misleading.

Debra Daniels is a social worker who administers the YWCA women in jeopardy program. Her conclusion and opinions about the act are not valuable. Her experience is that many battered women are pregnant and carrying a pregnancy to term may create increased risks and difficulties in caring for children. Nancy Gilpatrick, a social worker

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[7](...continued)
questionable.

[8]The risk factor in the Utah statute is the risk of carrying a child to birth. Utah Code Ann. § 76-7-305.5(1)(c).

with the Rape Crisis Center in Salt Lake City, has presented information on the traumatization from a rape/pregnancy. Women in such a situation have many problems even in thinking about the pregnancy. Abortion is less traumatic than childbirth. Abby Trujillo Maestas, Executive Director of the Rape Crisis Center in Salt Lake City, contends S.B. 60 would have an adverse psychological effect on the woman because of the 24 hour waiting period.

Dr. Judith E. Belsky, M.D., psychiatric consultant for the Department of Obstetrics and Gynecology at Bellevue Hospital in New York City, indicates the 24 hour waiting period will be onerous for clinically depressed mentally ill women, especially if they live a distance from the abortion provider. Such women have difficulty mobilizing themselves. Belsky has provided general information on depression. She notes that an unwanted pregnancy, whether terminated by childbirth or abortion, may lead to exacerbation of problems for women with psychiatric disorders. An unwanted pregnancy may aggravate stress related psychological conditions. Women who are psychologically disturbed and denied an abortion may suffer aggravation of their condition. The doctor has indicated that in pre 1970 studies a two week waiting period before a determination of a committee decision to abort caused some women to obtain an illegal abortion. She also refers to problems of getting to a clinic on two separate occasions. She concludes the 24 hour waiting period under Utah law may cause acute distress.

Rhonda Lehr, M.D., a psychiatrist and assistant Chief of Psychiatry at McKay Dee Hospital in Ogden, Utah states that a waiting period would constitute a powerful barrier to abortion for many emotionally impaired women. This is because an obstacle can serve as a barrier to impaired women. For a woman who does not have an intact ego

structure, her ability to make an independent decision in the face of countervailing pressures may be substantially impaired.

The plaintiffs have submitted the statement of Nancy C. Rodgers of the New Women Medical Center on problems in Mississippi from anti-abortion activists. The evidence is remote, irrelevant, and dissimilar to circumstances in this case and will not be considered. Furthers the waiting period under Utah is not related to such circumstances. This type of evidence is of no assistance to the court. The declaration of Gina Shaw from the National Abortion Federation (NAF) provides statistical data and documentation of harassment and violence against abortion providers. A review of the submission shows it is not relevant, the opinion in paragraph 8 is not helpful to the issues. The submission is partially anecdotal and very conclusory and argumentative. This issue requires a more tailored, fact specific relationship to the statute. The submission of Gina Shaw does not meet the standard for relevance and will not be considered. The evidence would not be admissible at trial, Rule 401, 404b, 702, F.R.E. and is not helpful on the resolution of the constitutional issue in this case.

Hope Busto-Keyes is a family nurse practitioner at the Wasatch Homeless Health Clinic and at the Indian Health Care Clinic in Salt Lake City. Her opinion on the effect of the statute is rejected as beyond her expertise and merely argument. Rule 702, F.R.E. Her statement that 1.4% of the population of the State of Utah is Native American and the fact that 50% of all patients at the Indian Health Care clinic do not have insurance is relevant. She also indicates there are cultural barriers for Native American women in obtaining abortions. The other portions of the submission are rejected as beyond the witness' expertise and mere fashionable speculation, generalization, anecdotal,

stereotyped and argumentative.

Dr. Harold Kamindzky, M.D., is a specialist in obstetrics and gynecology and Director of Practice Activities for the American College of Obstetricians and Gynecologists (ACOG). The ACOG has standards for its members concerning informed consent and abortion procedures. The specific standards are attached to Dr. Kamindzky's submission. There are specific guidelines on informed consent which require the physician to inform the patient of the "surgical or medical procedure being recommended." The standards also require a woman to be counseled as to "the options for the management of an unwanted pregnancy" and the woman "should be allowed sufficient time for reflection before she makes an informed decision." If outside counseling from another source has been provided the physician should verify it.

Jay Katz, M.D., and professor of law, medicine and psychiatry at Yale Law School submits that S.B. 60 is in conflict with true informed consent and contrary to medical ethics. The information in S.B. 60 is said to be unresponsive, insensitive and even traumatizing to women pregnant from rape and incest. This material is argumentative and not of significant objective value.

A declaration of A. Howard Lundgren, a Utah attorney has been submitted. It is of no value and not proper evidence and is rejected as not of assistance. Rule 702 F.R.E. See also *Specht v. Jensen*, 853 F.2d 805 (10th Cir. 1988); *United States v. Simpson*, 1993 WL 390465 (10th Cir.1993). Also rejected is the submission of Victoria Garcia. It is not proper expert evidence and not helpful. Rule 702, F.R.E. The declaration of Nola D. Lodge is not

suitably tailored for consideration.[9] Several of her opinions are mere lay expression and not helpful. Much of her presentation is otherwise irrelevant or redundant. Of some evidentiary worth is her assessment of the cultural inhibitions and circumstances which may affect the situation of some Native American woman considering an abortion.

Plaintiff, Sarah Roe, states she is 7 weeks pregnant (at the time of the submission) and is scheduled for an abortion at the Utah Women's Clinic. She is fearful her parents might find out about her pregnancy and forthcoming abortion. She is also fearful if she has to make two trips to the center her situation may be uncovered. She is concerned that her employer may find out. She states she cannot take two days off of work.

Jane Boe, not a plaintiff but a prospective patient for an abortion at the Utah Women's Clinic, states she wants the abortion because she is single and "does not see herself as a single parent." She wants the abortion in Salt Lake City because she does not want anyone to know she is having an abortion. She would not go to a counselor in Idaho for this reason. Boe owns her own business and she believes if she has to wait 24 hours she would lose three days business and a lot of money. She has consulted Planned Parenthood in Idaho but she does not explain why she would accept counseling service at that program and not from someone else. She came to the Utah Women's Clinic on April 7, 1993, but could not be scheduled until April 13, 1993. She states she is fearful of an ectopic pregnancy but does not state whether or not that has ever been diagnosed by a responsible abortion care provider as having such a

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[9]Her statement as to the distance from the Piute Indian Reservation to Salt Lake City as being 452 miles is false. Other information is equally erroneous as matter of judicial notice, Rule 201, F.R.E.

condition. Boe does not explain why she would consult Planned Parenthood in Idaho, but not a physician. Virginia Coe is a resident of Wyoming, pregnant, and a patient at the Utah Women's Clinic. She is forty-one and does not want another child. She has had two children by C section. Coe came to Utah because she does not know any "clinic in Wyoming closer to my house." She drove for three hours to get to the clinic and drove three hours back home. She might have to have used a vacation day if she had to wait for 24 hours.

Tracy Joe is 19 years old and pregnant and resides in Salt Lake County. She wants an abortion because she believes she is too young to have a baby. She is in college and wants to finish. At one point she went to the Utah Women's Clinic. She apparently had contacted the Wasatch Clinic but Utah Women's Clinic could take her two days earlier. A year previous she went to the Utah Women's Clinic with a friend who was getting an abortion and there were picketers. Joe works nights in a restaurant. If she had to wait 24 hours she would lose an additional night's wages, although why she would need to take off a night when she would get counseling in the day is not explained. She fears she might be fired from her job. No factual basis for the "fear" is provided.

Another person, Carry Moe, first went to an abortion clinic in Idaho. However, because she was 15 weeks pregnant the clinic would not perform the abortion and she was referred to another doctor in Idaho but could not obtain an abortion for two weeks. She then tried to have a miscarriage. She then sought an abortion in Utah. She drove 600 miles for an appointment but because she was in her second trimester she had to wait two days.

Penny Roe states she is going to get an abortion

because she was not prepared to have a child at this point in her life. She went to a clinic and was counseled in the morning and scheduled for an abortion in the afternoon, but it was determined she was twenty weeks pregnant. She would have to come back for a two day procedure. Rita Roe is 29 and pregnant and lives in Kearns, Salt Lake County, Utah. She wishes an abortion because she has three children and cannot afford to raise a fourth child. She states that to carry a pregnancy to birth would pose a risk to her health due to high blood pressure. If she had to wait for counseling, she fears her blood pressure would worsen. There is no medical evidence on this contention. She would have to take off a second day of work and lose $40.00. She also is fearful of being fired. She works at night, it is not clear why she would have to take time off from work for counseling.

Jane Homeless, is a pregnant patient of the Utah Women's Clinic. She has three children, is homeless, and is staying at the Women's Homeless Shelter. She has been involved in an abusive relationship. Her boyfriend often beat her children. She is twenty-one weeks pregnant. She would have to have waited for her abortion. Jane's mother is the mother of a fourteen year old patient of the Utah Women's Clinic. The child is believed to be too young to have a family and she has discussed the matter with the child. If a twenty-four hour waiting period were in place, the mother, who is trying to finish school, would have to miss an extra day of school. She believes the counseling information to be irrelevant to her situation. The daughter states if she had to go to the clinic twice she would lose an extra day of school.

Dorothy Loe is 21 years old and six to seven weeks pregnant. She resides in Ogden. She intends to have an abortion because she is not prepared to have a child at this time. She had to get a ride to the clinic and if she had to go

twice would need to get another ride. She is also concerned about confidentiality. Jane Voe is 40, unmarried, and the mother of four children. She is going to have an abortion because she is not married and fears birth defects due to her age. The father of her pregnancy is addicted to cocaine. She would have to lose an extra day's work if she had to wait an additional period. Lisa Roe is nineteen, lives in Fremont County, Wyoming and does not have a job. She does not have a car and has had to rely on others for transportation. She is joining the military and does not want a child. A second trip would be difficult. There is no explanation why Wyoming facilities are not available. The plaintiffs have submitted 27 submissions in response to defendants' submissions. Some of the material is redundant and was submitted as a part of the initial submission. The material is not necessarily proper rebuttal information. However, the possible relevant portions of the submissions are set forth. The materials have been examined for their utility in deciding this case.

Alissa Porter, administrator of the Utah Women's Clinic, was permitted to file a declaration out of time which has been denominated as her fifth declaration. That submission will be evaluated by the court.

Wendy Edwards, a counseling supervisor at the plaintiff Utah Womer's Clinic, states that the clinic is a member in good standing of the National Abortion Federation ("NAF"). The clinic operates in compliance with NAF standards and the Standards for Obstetric and Gynecologic Service of the American College of Obstetricians and Gynecologists ("ACOG"). Counselors are trained to comply with the NAF standards which consist of two different processes. First, the decision making process where the woman makes a choice as to whether to abort or continue her pregnancy. Seconds an informational and educational process is provided in

which the specifics of the abortion procedure and after care are provided to the woman. These steps overlap and informed consent is obtained. Women coming to the clinic are given a booklet containing information about several aspects of abortion and alternative services. The booklet is a part of the plaintiffs' submission. 90% of the women who go to the clinic have "already" decided to terminate their pregnancies and 99% have spoken to "someone in reaching their decision." Most women have made up their mind one week or often several weeks prior to coming to the clinic. Counselors still discuss with "all women their decision" to obtain an abortion. Informal consent is obtained if the woman wishes to continue her choice to abort. This process includes listening to an audio tape as well as a careful explanation by a counselor. Counseling sessions are not perfunctory and explore the woman's options. The counseling session usually lasts 45 minutes. Moral and religious issues are discussed as well as the woman's support system. Ambivalence is looked for and a woman sent home if the counselor believes the woman is not ready. If the woman is not ready emotionally the same response occurs. No coercion is employed. Assistance programs for a woman who may wish to bear the child and place it for adoption or attempt to rear it are made available as part of the counseling process. About 5% of the women who go to the clinic are turned away. It is Edwards' opinion that S.B. 60 would not assist the current practice.

Denise Defa, one of the plaintiffs and an administrator at plaintiff Wasatch Women's Clinic, has submitted a rebuttal statement. The center provides two distinct types of counseling based on whether the woman indicates that she has already made up her mind to have an abortion or is still undecided. 75% of the woman who contact the clinic want to schedule an abortion. Most have already discussed the matter with a friend or professional counselor. Women are

scheduled for two appointments involving consultation and the abortion procedure, both of which 'can" be done on the same day. 5% of the women who contact the clinic want to discuss their options and they are scheduled for only a consultation. About 20% of others who call are seeking general information. Counseling on the abortion decision and process is provided including information on the embryo/fetus development. Adoption information is provided. A recording of the procedure is also provided along with other consultation and information. The majority of women who go to the clinic have thought about their decision and 25% are referred by a Planned Parenthood counselor. Women who are emotional, uncertain or negative are sent home and advised to return another day if the woman chooses. Financial concerns are discussed where the decision to abort is based on economic considerations. Some appointments are made only for consultation. If the woman, after the consultation on the abortion decides to go forward with an abortion, two additional appointments are made, one for counseling and the procedure itself. "We never proceed with the abortion on the same day as the decision making session" (¶ 17). Post abortion counseling is offered. Very few women take advantage of this service. The clinic is "very careful to ensure that the woman has chosen to have the abortion without pressure or coercion and that she is comfortable" with the choice. Defa believes S.B. 60 will not help.

Dr. Stanley Henshaw (Ph.D) is the deputy director of Research for the Alan Guttmacher Institute in New York City (AGI). it collects original data on the delivery of family planning and abortion services in the United States. Henshaw challenges the conclusion that an abortion has a negative impact, as stated. The "WEBA" survey. Henshaw states that WEBA's members are only a tiny part of the 20 million women who have had abortions in the United States.

Henshaw sets forth his conclusion as to what he asserts are inappropriate conclusions and inferences drawn from the WEBA study. His submission challenges the credibility of the study.

Barbara Radford is Executive Director of the National Abortion Federation (NAF) which organization has worked to enhance the quality and accessibility of abortion services. Standards for admissions and rendering of services by NAF members have been established and are set forth as an appendix to Radford's submission. The standards are high and demand a substantial assurance of an informed consent and accurate awareness of relevant procedures by a woman considering an abortion.

Alissa Porter, a plaintiff and Executive Director of the Utah Women's Clinic made a submission at the time of consideration of the temporary restraining order (File Entry 4, Exh. I) in which-she contends S.B. 60 will interfere with the clinic's operation and endanger the clinic's patients. There are 3 physicians, 1 nurse, 1 physician's assistant, 4 medical assistants, 10 support staff and 7 counselors at the clinic. The clinic's procedures are set forth and the submission need not be detailed. She had provided some of the same information in other submissions. No woman has died from an abortion, and less than 1% require hospitalization from abortion complications. Abortion costs are stated along with the procedures before twelve weeks and after. Many patients are low income women. The average patient's income is under $22,000. The clinic may discount expenses. Patients seek abortions for a multitude of reasons including medical problems. 82% are white, 8% Hispanic, 1% Oriental, 2% black, and 1% American Indian. Patients come from out of state. 54% are from Salt Lake County (¶ 125, File Entry 4). The submission also reiterates the information in the submission of Wendy Edwards, infra.

Porter sets forth subjective and argumentative conclusions as to how S.B. 60 will interfere with clinical operations. She also contends the law is ambiguous as to the physicians obligations. She submits that the April, 1993 Utah Department of Health (UDH) materials required to be available to a woman seeking an abortion are false and misleading.[10] Ms. Porter submitted a supplemental declaration as Exhibit 5 of the plaintiffs' submissions which adds to her submission submitted in support of the temporary restraining order. Her submission challenges the correctness, efficacy and objectivity of the UDH alternative information, which is available to women seeking more information on abortion as required by S.B. 60. The submission shows that some of the listed materials are foreign publications. The accessibility of these materials has been alluded to in these proceedings including the argument before the court. However, it does not appear that these are the same materials that UDH is currently intending to use.

The plaintiffs have submitted the hearing before the *Human Resources and Intergovernmental Relations Subcommittee of the Committee on Government Operations of the House of Representative of March 16, 1989*. The hearing includes a substantial number of statements, letters, and other submissions of various persons made to the committee. The papers in several instances go well beyond

[10]The specifics of this position were considered by the court at the time of the restraining order hearing. The question of the propriety of the UDH material is not framed as a specific issue before the court. However, it is evidentiary as to the impact the statute may have if implemented. However, this is a circumstance that can be changed by the UDH to correct any deficiency and does not undermine the facial validity of the legislation. The April 1993 materials have in fact been changed.

that which is pertinent to this case.[11] The report provides statistics that show that the number of deaths from abortion has declined to virtually zero. The rate of death from maternity has also declined, however, it is significantly higher than from abortion. This conclusion is also verified in an individual submission of plaintiffs. The report submission does indicate some doctors and researchers believe post abortion syndrome or like experiences do exist but not to the extent that had been previously suggested and the research conclusion in support of such a situation is still open to question and further research and development necessary.

The Research Review of the Psychological Sequences of Abortion, December 2, 1987 concludes on the same point that "Conclusive Scientific findings are not possible unless future research is designed so that its reliability can be tested [in a manner to assure validity]... conclusions about the psychological sequela of elective abortion are tentative at best ... significant psychological sequela to abortion are rare." *Id.* p. 18.

Also submitted is the Tenth Report by the Committee on Government Operations, *The Federal Role in Determining The Medical and Psychological Impact of Abortion on Women*, 1989, HRR 101-392.[12] Of value in

[11]Counsel would be advised to edit such materials to those parts which are relevant. There is a mass of material which contains a significant amount of information that is of no utility to the court in resolving the issues in this case.

[12]See note 11 supra. In addition, the submissions contain some obvious political overtones. However, as will be noted hereinafter, political considerations are not impermissible in the evaluation of a state's

(continued...)

this document is the conclusion of the Surgeon General and researchers that abortion is medically safer than pregnancy and childbirth in terms of mortality and morbidity. It is also concluded that psychological problems from abortion are rare and not significant from a "public health viewpoint." Also submitted is a document on Surgeon General C. Everett Koop's study of abortion. The report is adequately discussed in its relevance in the before mentioned HR101-392 and the document is more an argument as to what conclusion should be drawn from Dr. Koop's research. Also submitted is a "White Paper" the " Psychological Aftermath of Abortion" submitted to Dr. Koop (Response Submission #11). An article from the New York times has been submitted entitled "Anti Abortion Movement Prepares to Battle Clinton." The submission is of no assistance. The plaintiffs' have submitted Technical Report No. 166, December 30, 1992 "Induced Abortions in Utah: 1990" by staff members of the *Division of Health Care Resources Bureau of Vital Records and Health Statistics, Center for Health Statistics*. The report shows a rise in the number of induced abortions in Utah. For 1990, 4,855 abortions were performed, 4,159 were of resident women. Utah's ratio is substantially below that of the ratio for the United States at large. The greatest number of abortions are in Salt Lake, Davis, Weber, Summit, and Utah counties. These are the metropolitan counties of Utah constituting the "Wasatch Front." More than 50% of abortions are performed on women who have never been married with the second greatest category being women who are divorced. 4,159 abortions were performed in Utah in 1990. 3,585 women

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[12](...continued)
response to the abortion question. The abortion issue is probably more political, social, and legal than medical. Lawrence H. Tribe, Abortion: The Clash of Absolutes, 139 et seq. (1990).

were white, 97 black, 50 Oriental, 9 Indian, and 179 other.[13] The overwhelming number of abortions are performed before the expiration of twelve weeks. 17 abortions were performed because the maternal life was endangered, 26 because of fetal malformation, 50 because of rape, 1 due to incest, 3,861 for "therapeutic purposes,"[14] and 9 "elective." Others make up a statistically insignificant number. In only *one* abortion was there any complication.

An exhibit was submitted from researchers from the Alan Guttmacher Institute on "Why Do Women Have Abortions", Vol. 20 Family Planning Perspective #4 p.169. It appears the largest percentage of women surveyed have abortions because they are concerned that having a baby could change their lives, a desire to avoid single parenthood, inability to afford a baby, that the woman believes herself unready for responsibility, the woman is too young or immature. There were other reasons provided, but they were not as statistically significant. Ninety-five percent of women who become pregnant from rape gave one other factor that had contributed to the decision to have an abortion. Women in the survey gave multiple reasons for an abortion. A significant percentage also indicated having a child would interfere with their job or employment, career or schooling. Women who delayed having an abortion were most often those that didn't realize they were pregnant or misjudged gestation, found it hard to make arrangements for an abortion, were afraid to tell parents or a partner, or who took additional time to decide whether to have an abortion.

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[13]The breakdown does not contain a category for Hispanic women.

[14]The full meaning and range of the term therapeutic in this study is not defined. It is assumed this means there is some legitimate health justification for the abortion as determined between the woman and the abortion provider.

Of the women who found it difficult to obtain services, sixty percent said they needed time to obtain money. The second most common reason was the initial person they contacted did not provide services. Twenty-five percent had difficulty arranging transportation. Twenty percent didn't know when to get an abortion. Of the women who delayed because it took time for them to make a decision, seventy-eight (78) percent volunteered that the decision had been difficult.

An article in the same journal entitled "Abortion Utilization: Does Travel Distance Matter" (Exh. 14). The study was done primarily in the Southern part of the United States. The study concludes that there is a correlation between distance and the determination to get an abortion. However, in Georgia once a distance of 150 miles is reached, the distance to obtain an abortion is no longer a significant factor. Distance is a greater factor for black women than white women. However, the research does conclude the possibility that rural women may not need abortions as frequently although there is still a distance and frequency correlation. The conclusion is "The time, money and effort needed to travel may not be the only impediment to utilization of a distant abortion facility. A woman who wants an abortion may simply not know of the existence or availability of an abortion provider outside her community." Operationally, however, the effect is probably the same. A woman who lives farther from abortion facilities will be less likely to obtain an abortion.

Another study in Volume 16, Family Planning Perspectives #1 (1984), addresses the public health effects of abortion concluding that abortion has averted perhaps 1,500 pregnancy related deaths and thousands of life threatening complications. In another submission research shows about one third of births are unintended with a higher

rate for older aged women.

Another submission from Family Planning Perspective 22 #3 (1990) observes a decline in the number of abortion providers, primarily in hospitals. The article states that abortion rates by states vary dramatically. There has been an increase in abortions in Utah from 4,440 in 1985 to 5,530 in 1988. Only a small number, 8% of abortions in Utah are provided to out of state residents. Another submission (Ex. 18) provides a world review of induced abortion in 1990. Although of peripheral interest there is no data that weighs valuably on the issues in this case.

Plaintiffs have presented materials on post traumatic stress disorder in women and the treatment of battered woman syndrome. Such women do not have a sense of competency or self confidence in their own abilities. The treatment process may be labeled "reempowerment." Disassociation, anger, and other emotions are apparent with such women. Also submitted is an article, "Psychology and Violence Against Women," *American Psychologist*, April 1989. ACOG technical bulletin 124, 1989 "The battered woman" has also been submitted. Physical abuse during pregnancy has been noted in 11% of women visiting a prenatal clinic (not identified). Counseling is an important intervention in treating abused women. Various resources need to be considered and referrals made to assist the abused woman. A study "Battered and Pregnant, A Prevalence Study" has been submitted. The study involved interviews of 290 pregnant women. 24 of these women reported battering during their pregnancy (8%) An article on battering during pregnancy and intervention has been submitted which shows a significant number of battered women are also subjected to the same abuse during pregnancy.

The battering appears to be cyclic. The authors suggest interruption of the cycle by prenatal care givers in three ways. Primary intervention is education, secondary prevention involves intervention and therapy. Tertiary prevention includes referring to shelters. An article on "Physical Abuse in Pregnancy," *Obstetrics and Gynecology*, 66 No. 2, August 1985 concludes that women who lived with an abusive partner did not experience adverse pregnancy outcomes more frequently than did those who had abusive relationships There is, however, an apparent statistical association between pregnancy and abuse. Women in such circumstances need to be identified and considered for intervention. Also submitted is a monograph as to wife abuse in the medical setting. It is noted 73% of battered women in the survey were single, divorced, or separated. Battered women were more likely to terminate pregnancies by abortion or-miscarriage. Battered women have a rate of pregnancy higher than non-battered women.

In an article in "Psychological Aspects of Genetic Counseling" the special psychological considerations are discussed including the prevalence of guilt feelings of women who have abortions. Women who undergo pregnancy termination against their will, "even at the pressure of a physician" are at a "particular risk for untoward emotional sequelae of abortion." *Id.* p.204. Two thirds of such women experience psychological problems because the termination of pregnancy was often of a wanted pregnancy. Emotional trauma attendant to elective abortion has declined over the past two decades where a defective fetus is identified. A "couple may elect to continue pregnancy ... for a variety of reasons." This may occur even if there is a severe fetal abnormality. For those who select abortion, post abortion depression is frequent and severe. The election of abortion may involve an emotional burden associated with "genetic disease" and rekindle negative

emotions that may have existed before. Diagnostic counseling and informed awareness of any risk is important activity for the care provider. Prenatal diagnosis based on genetic risks is likely to increase in the future. Another submission in the area of genetic disorders "Genetic Disorders and the Fetus" 1979 comments on the importance of genetic counseling.

A late submission was permitted and received from plaintiff Alissa Porter. The declaration of Ms. Porter states an incident of when she received a stick of gum wrapped in paper with a bible quote. The message was sent from California with an LDS church office building return address. The submission also attaches and lists harassments made against the clinic in Salt Lake City.

Defendants' Factual Submissions

The defendants have submitted a transcript of the meeting of the Human Services Senate Standing Committee on February 1, 1993. The transcript apparently contains statements of persons appearing before a Utah Senate Committee in support of S.B. 60. The credentials of some speakers are not provided or just who they are is not shown. The information is purely anecdotal and of no assistance to the court and will not be considered. (See Rules 401, 402, F.R.E.).

A transcript of the debate in Utah Senate Chambers during the 1993 General Legislative Session on S.B. 60 on February 5, 8, 17, 1993 has been submitted as well as another affidavit as to how the transcripts are kept. The debate on February 5, 1993 on S.B. 60 reflects that Senator McAllister, apparently a sponsor of S.B. 60, indicated that

the Utah legislation was to parallel that in the *Casey* case.[15] The only aspects of abortion that S.B. 60 was intended to address were the 24 hour waiting period and informed consent. At one point in his discussion Senator McAllister states the physician providing the information to the women considering abortion need not be the physician who will perform the abortion. The statements further indicate the Legislature was aware of the special problems of rural women. Senator McAllister states "This will avoid the necessity of having to come to Salt Lake, be informed, wait 24 hours and then have the abortion." Senator McAllister also noted this could otherwise occur in communities where there was no physician and that an amendment to allow other licensed medical people to act was proper. If the information is given by anyone other than a referring physician the information must be repeated. The reason for this redundancy is not explained. Senator McAllister states that the legislation is designed to "serve the needs of unborn children." He states that: "If we can through this process be able to persuade those who would ... have abortions performed to carry them to term, all the efforts that we will have made will certainly be worth it." On February 8, 1993 a further debate was held on S.B. 60. Senator Mantz asked for a clarification of S.B. 60 in relation to other legislation on the books. S.B. 60 was not intended to effect the 1991 legislation. At one point an amendment was proposed and Senator Montgomery opposed it. In the course of this objection he noted the need not to impose an undue burden on women residing in the rural areas of Utah.[16] On February 17, 1993 another Utah Senate hearing on S.B. 60 was held following action in the Utah House of Representatives. The bill was approved.

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[15]Planned Parenthood v. Casey, infra.

[16]The Amendment proposed by Senator Baird was voted down.

Diane Barmore had an abortion at what she thinks may have been the Utah Women's Clinic, although she is not certain. She indicates she did not get adequate counseling on fetal development and financial assistance. Since the abortion she has struggled through depression which she attributes to suppression of her feelings about abortion.

Patricia Diane Christie, a single woman with two children out of wedlock, became pregnant in March, 1988. She did not have financial resources and is uncertain whether she was aware of the option of adoption. She approached the Utah Women's Clinic where she was given a blood test and it was determined she was pregnant. Later an appointment was made for an abortion. She later went to the clinic. She was upset. She spoke to a woman for about ten to fifteen minutes. Christie was crying and the woman asked if she ought to come back another day. Christie said if she didn't do it then she wouldn't do it. The woman then advised as to the abortion procedures. No explanation was made about adoption, abortion risks, or financial assistance. Christie was still visibly upset and discussing the matter with herself. In retrospect she wishes she had had more information.

Shannon Lee Dow has presented statements. Due to an adulterous affair she felt the need to have an abortion in spite of reservations. At the Utah Women's Clinic she received only fifteen minutes counseling about abortion procedures. Subsequent to the abortion she experienced guilt and emotional difficulties attributable to the abortion decision. She also became depressed and considered suicide. She overcame her problems by joining a support group. Julie Frost states in her affidavit that she became pregnant and sought advice from Planned Parenthood in Canyon, Texas. Her experience is not relevant to this litigation and is

insufficiently probative to warrant consideration.

Rhonda Gardner became pregnant in 1979 and went to the "Utah Clinic," she thinks. Her evidence as to this experience is remote, anecdotal, conclusory and insufficiently probative to be of any value The same is true as to her 1980 experience. The statement she makes as to her guilt and remorse, although of some weight, will be considered for its worth.

Corina E. Francis Gomez became pregnant during the summer of 1989. Her boyfriend suggested an abortion. He also stated he would not support the child. She was opposed to abortion but experienced stress due to financial reasons. Pressure was placed on her from her boyfriend to have an abortion. Ms. Gomez' boyfriend contacted Utah Women's Clinic and he arranged a counseling session. Ms. Gomez and her boyfriend went to the clinic and a woman spent 10 to 15 minutes talking to them. This included procedures and a chart as to the length of her pregnancy. Nothing was said about risks. The woman said it was "no big deal" and the matter could be resolved then or the next day. After a week and a half and pressure from her boyfriend, Gomez relented. The abortion procedure was set for two days and the abortion was performed. No other counseling was provided.

She had trouble with post abortion bleeding and called the clinic twice to complain and was told it was not necessary to come to the clinic. Since the abortion she has experienced tremendous remorse, grief and anxiety. Had she known of the extent of the formation of the fetus she would never have terminated her pregnancy.

Manda McAffee was fifteen when she became pregnant. The man who was the father moved away but his parents wanted her to have an abortion. In 1991 the parents of the

father arranged for Ms. McAffee to have an ultra sound at a Utah hospital. She found out she was six weeks pregnant. She was between the pressure of her boyfriend's parents to have an abortion and her mother who was opposed to it. A substance abuse counselor advised her to get an abortion and the counselor had access to funds to pay for the abortion. The Utah Women's Health Clinic was contacted and an appointment set. Cost had been a factor in her hesitancy. In the meantime Ms. McAffee's mother provided her with pamphlets showing pictures of a fetus which caused McAffee to be hesitant. She kept the appointment at the clinic and an ultra sound was done. She could see a picture on a screen. She became undecided and told the center staff she wanted to wait awhile longer. She was then three months pregnant and into her second trimester. She was told by the center that if she did not get the abortion then, she would be into her second trimester and it would cost more. She again saw a photograph of a fetus and decided not have the abortion. She gave birth to the child. She believes her decision, which she is glad she made, was because of the pictures she was shown.

Alexandria Ortiz became pregnant in 1992. She was twenty-two years old and had just separated from her husband and decided to get a divorce. She decided on an abortion and told her mother and husband of her decision. Both her mother and husband wished Ms. Ortiz would have the baby. She was still determined to have an abortion. She went to a place called either the Utah Women's Clinic or Utah Women's Health Center. She spoke to a doctor about the cost of the abortion. She was told to call if she wished an appointment. While at the Utah State Fair she was shown an illustration of a fetus. Based on the information she decided not to have an abortion and to give birth to her child.

Larry Putnam, Hospital Administrator for the San Juan County Hospital in Monticello, Utah, states there are five physicians at the hospital who have privileges in the area of obstetrics.[17] A three bed birthing center is provided by the hospital in Blanding, Utah. Three of the hospital's physicians practice obstetrics in the Blanding facility. Under the federal Rural Health Outreach Grant, the hospital, along with Monument Valley Hospital, Monument Valley, Utah[18] and Southeast Utah District Health Department provided mobile clinics throughout San Juan County and the Navajo Indian Reservation which includes consulting services in the area of obstetrics and pregnancy counseling. The affidavit does not indicate what, if any, abortion counseling or services relevant to S.B. 60 might be provided.

A monograph by David C. Reardon, whose credentials are not provided, does not tell the date and place of the publication, which has been submitted by defendants. It is entitled "Aborted Women: Silent No More." The monograph notes two methods of determining who and why women abort. One is subjective interviews. The other is objective conclusions based on surveys and statistical analysis. Both are included in Reardon's work. 55% of women who abort are between 20 and 29, 30% are teenagers and 16% are women over age thirty (coming to 101%). 80% of the women are unmarried and single parenthood is the primary factor in the abortion decision. 58% of the women who aborted had no children. The more children a women has the less likely she is to abort. 2/3 of all abortions are done

[17]San Juan County contains the Utah portion of the Navajo Reservation. Monticello is a short distance from the Reservation boundary (Rule 201, F.R.E.).

[18]Located on the Navajo Reservation.

on white women, 1/3 on non-white women. The figure that 13% of all women are not white, suggests non-white women have abortions twice as often as white women.

An article is submitted from Wanda Franz and David Reardon in Vol. 27, No. 105 of "*Adolescence*." Wanda Franz is identified as a Ph.D Professor of Family Resources at West Virginia University. Reardon is not identified. The article is entitled "Differential Impact of Abortion on Adolescents and Adults." The article notes abortion is the most common surgical procedure performed in the United States today. Around 1.6 million abortions are performed in the United States every year. 29% of all pregnancies end in abortion. Many studies on abortion have concluded that teenagers are not negatively affected as a group and may benefit from the procedure. Other evidence indicates adolescents have negative reactions about their abortion experiences. Some clinicians have expressed concern over the long term effects of abortion with regard to women in a therapeutic situation. "Post Abortion" stress was detected in a portion of women, including long term negative effects. A range of experiences was detected in adolescents depending on their age at the time of the abortion. The study done by the two authors concludes adolescents reported greater dissatisfaction with services including feeling uninformed, pressured, and confused. Self image may be affected. It is concluded the women should be fully informed by counseling before an abortion is performed. Counseling should take account of the woman's opinions and feelings with regard to abortion. There is evidence adolescents may prefer to keep the baby, but then abort, This may be due to "adolescent idealism." Adolescents have limitations as to decision making ability. Some women do experience post abortion problems.

An article from the New Zealand Medical Journal of 22

January 1992 refers to an article on the outcome and management of crisis pregnancy counseling. The article is not helpful. An article by Landy, not identified as to position or credentials, was submitted. The article appears to be a part of another publication entitled "Clinics in Obstetrics and Gynecology." The article is entitled "Abortion Counseling - A New Component of Medical Care." The article states that the majority of abortions are not the result of medical indication but an elective procedure. Issues in abortion counseling are identified and discussed. The author concludes that there is a need for full and effective advice and it should be individually tailored for the woman in question.

The defendant also submitted rebuttal materials. Randy Baker, Director of Research and Data for the Utah Hospital Association, has provided a list of all hospitals in the State of Utah. All counties in Utah have hospital facilities except Rich, Piute, Wayne, Summit, Daggett and Morgan counties.[19] Summit, Rich and Morgan counties are in very close proximity to counties having hospitals in Utah and Wyoming. Piute is a small county in South Central Utah, easily accessible to Sevier County facilities and the city of Richfield. Daggett County is remote and the most accessible area for medical services would probably be in Wyoming. Wayne County is also remote but there are hospital services in surrounding counties.

Mark Stoddard, Hospital Administrator of the Central Valley Medical Center in Nephi, Utah states that four physicians have privileges to practice in the area of obstetrics in that hospital. This includes counseling services. He is also the hospital administrator -for the Gunnison

[19]These are rural counties with very small populations. Some of the counties are geographically small. Rule 201, F.R.E. 53

Valley hospital where five physicians have privileges in the area of obstetrics. Gary Peak, Hospital Administrator for the Sevier Valley Hospital in Richfield, Utah indicates there are three physicians with obstetrical privileges at that hospital.

Gary Beck, Hospital Administrator for the Sevier County Hospital in Richfield, Utah advises that at that facility there are three physicians who practice in the area of obstetrics. Wayne Ross, Hospital Administrator of the Garfield Memorial Hospital in Panguich advises that at that hospital two family practice physicians also have privileges to practice in the area of obstetrics and a family nurse and physician's assistant provide counseling services in the area of obstetrics. Patty Puckett of the Castleview Hospital in Price, Utah states that there are two physicians with privileges in the area of obstetrics at that hospital. Deena Mansfield of the Ashley Valley Medical Center in Vernal, states there are four physicians with privileges for obstetrics at that hospital. The Monument Valley Hospital in San Juan County has two physicians who practice in the area of obstetrics and one OB/GYN nurse practitioner who provides consulting services. There are five physicians who practice obstetrics and one nurse practitioner at the Wasatch County Hospital in Heber City, Utah. Two physicians have obstetrics privileges at the Fillmore Medical Center and three registered nurses provide consulting services in the area of obstetrics. Five physicians practice in the area of obstetrics at the Sanpete Valley Hospital in Mt. Pleasant, Utah.

John E. Brochert, director of the Bureau of Vital Records and Health Statistics, Utah Department of Health, Division of Health Care Resources, has submitted statistical information concerning abortions performed in the State of Utah. In 1992 3,941 abortions were performed. 3,853 in Salt Lake County and 88 in Weber County. 4,324 abortions were

performed in 1991, 4,110 in Salt Lake County and 103 in Weber County. The overwhelming number of women having abortions resided in Wasatch Front counties (Logan City to Provo).

Keith Van Orden of the Utah Department of Commerce provided information on persons who provide medical services in Utah counties and in other states, who are licensed in Utah. 23,377 persons practice in Utah as physician/surgeons, registered nurses, advanced practice registered nurses, certified registered nurses, anesthetists, nurse midwifes, physician's assistants, licensed practical nurses, psychologists, marriage and family therapists, clinical social workers and certified social workers.

Rod L. Betit, Executive Director of the Utah State Department of Health, indicates the department prepared a booklet in 1985 entitled "Information About Abortion Alternatives." In April 1993 a document entitled "Information About Abortion Alternatives Supplemental Material To Be Used With the September 1985 Edition," was prepared. In May 1993 the Department made a further revision of the materials. The May 1993 document, which was revised to comply with the provisions of S.B. 60 was revised and submitted as an Exhibit (Attachment A). The material in this June 1993 document is to comply with S.B. 60 and makes several changes over the May 1993/ publication. The document contains a statement that "A reference list is available on request." The reference list includes the following material:

William's Obstetrics, 19th edition, Appleton & Lange/ Norwalk, Connecticut, 1993

Danforth's Obstetrics and Gynecology, 6th edition/ J.B. Lippincott Company/ New York, 1990

Critical Care Obstetrics, 2nd edition, Blackwell Scientific Publications, Boston/ 1991

Induced Termination of Pregnancy Before and After *Roe v. Wade*, American Medical Association Council on Scientific Affairs, Journal of the American Medical Association 268: 3231; 1992

The materials include materials on abnormal embryos or fetuses. There has been added to these reference materials three other references:

Developmental Pathology of the Embryo and Fetus, Edited by James E. Dimmick, M.D., F.R.C.P.(C) and Dagmar K. Kalousek, M.D. F.R.C.P.(C), F.C.C.M.G., With 29 Contributors, J.B. Lippincott Company, Philadelphia, 1992

Obstetrics - Normal and Problem Pregnancies, Edited by Gabbe, Neibyl and Simpbon, Second Edition, Churchill, Livingstone, Inc., New York, New York, 1991

Maternal-Fetal Medicine: Principles and Practice, Creasy and Resnik, W.B. Saunders Company, Philadelphia, 1989

These are asserted to be standard and well respected medical works. Dr. Steven L. Clark; M.D. has provided information on gestational age and % of survivors.

An affidavit from Dodie Pert, who worked at the Utah Women's Clinic as a nurse from 1979 to 1981 was submitted. The affidavit is anecdotal, conclusionary, remote and not helpful and will not be considered. Marie Roes has presented information on her experience with an unwanted

pregnancy. The statement is not helpful to the issues and will not be considered.

The defendants have provided material from the Utah Women's Health Clinic which is apparently available for inquiring women. The material is entitled "Utah Women's Health Center Choices for Pregnancy" which has been submitted as an exhibit. A document from the Wasatch Women's Center entitled "Wasatch Women's Center for Reproductive Health" also attached as an exhibit has been submitted. A map of roads and highways in Utah has also been submitted. These booklets are the same as file entry #55.

A cover of a document entitled Tour Book from the American Automobile Association was submitted and a legend map of highways in Nevada, Colorado and Utah.

The defendants have provided Chapter I: Williams, Obstetrics, 19th Ed. which is part of the reference material in the Utah Department of Health June 1993 materials.

A statistical abstract of the causes of death in the United States from 1970 to 1989 has been submitted, however the material is not helpful or sufficiently relevant to this litigation.

An excerpt from the deposition of Madhuri A. Shah, M.D. in *Jane L. v. Bangerter*, 91-C-345-G given on January 23, 1992 has been submitted. Dr. Shah describes a condition of post abortion hemorrhage that can be a serious circumstance. Dr. Shah also indicates that it is rare in the doctor's experience for a battered woman to request an abortion but it does occur. The doctor performs abortions on women who have a fetal anomaly. It has usually been diagnosed by another doctor who has counseled the patient

about the anomaly. That counseling is usually gone over again along with any increased risk factor. Women have changed their mind "a lot of times." If the patient is not sure, the abortion will not be performed. 958 of the abortions performed are prior to 12 weeks LMP. No mortalities from legal abortions have occurred in Utah in the past ten years.

The above narration is a statement of the essence of the parties' submissions. The court has granted counsel rather liberal allowance in the presentation of the evidence. To the extent that some parts of the submission are not specifically referenced, the court has determined the matters were redundant insufficiently probative, or will otherwise be weighed in making the findings without specific reference. The court has made findings based on the evidence that are relevant to the specific issues as they are developed and discussed in this report and recommendation.

The Utah Abortion Statute

The Utah Abortion Act Revision is a part of the Utah Criminal Code. Utah Code Ann. Title 76, Chapter 7, part 3. The Utah provisions restricting abortions were first declared unconstitutional in *Doe v. Rampton*, 366 F.Supp. 189 (D.Utah 1973) following the Supreme Court decision in *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973). A new abortion law was enacted to comply with the newly stated constitutional standard. Laws of Utah 1974 Ch. 33 § 1 to 17; 1974 Utah L. Rev. 646. Portions of the new law were challenged, see *H B v. Wilkinson*, 639 F.Supp. 952 (D.Utah 1986) and the United States Supreme Court upheld portions of the law in *H.L. v. Matheson*, 450 U.S. 398 (1981). This was again modified by Laws of Utah 1981 Ch. 61 § 1; 1982 Ch. 18 § 1 and 1985 Ch. 42 § 1. Following the decision of the Supreme Court in *Webster v.*

Reproductive Health Services, 492 U.S. 490 (1989) the Utah Legislature adopted a new abortion statute which was more restrictive and limiting than the prior law. Laws of Utah 1991 Ch. 1 § 1; 1991 (lst S.S.) Ch. 2 § 2. This law was obviously enacted in anticipation of the possible overruling of *Roe v. Wade, supra*, and *Doe v. Bolton, supra.*[20] The history of the Utah Legislature's effort in this regard is set forth in Judge J. Thomas Greene's opinion in *Jane L. v. Bangerter*, 809 F.Supp. 865 (D.Utah 1992), which was an action brought challenging the 1991 Utah Anti-Abortion legislation. In that litigation, Judge Greene determined that the Utah abortion legislation was not unconstitutionally vague, the abortion statute did not violate the religion clauses of the Utah Constitution, did not violate the equal protection clause of the Utah Constitution, did not violate the freedom of conscience provision of the Utah Constitution and the free speech provisions of the United States Constitution, nor did the fact that the law provided for accessorial liability, Utah Code Ann. § 76-2-202 intrude on such rights. See *Jane L. v. Bangerter*, 794 F.Supp. 1528 (D.Utah 1992). The court ruled the Utah law did not violate the establishment clause or free exercise provisions of the First Amendment, U.S. Constitution. It was also held that the law did not offend equal protection standards of the Fourteenth Amendment. *Jane L. v. Bangerter*, 794 F.Supp. 1537 (D.Utah 1992). Finally, Judge Greene held the Utah law was unconstitutional because it banned pre-viability abortions before 21 weeks of gestation or 23 weeks from LMP. *Jane L. v. Bangerter*, 809 F.Supp. 865 (D.Utah 1992).

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[20]See generally, Richard G. Wilkins, et al., Mediating the Polar Extremities: A Guide To Post-Webster Abortion Policy, 1991 BYU L. Rev. 403; Clark D. Forsythe, A Legal Strategy To Overturn Roe v. Wade After Webster: Some Lessons from Lincoln, 1991 BYU L. Rev. 519.

The court found the law offended the undue burden standard of *Planned Parenthood v. Casey*, 112 S.Ct. 2791 1992). The court found the post viability provisions of the Utah law to be severable and constitutional. The court also held the "serious medical emergency" language of Utah Code Ann. § 76-7-315 was not unconstitutionally vague. 809 F.Supp. at 880. This ruling has significance in this case since the same language is involved in plaintiffs' claim as to the unconstitutionality of S.B. 60.

Following Judge Greene's ruling in the last *Jane L.* case, 809 F.Supp. 865, the Utah Legislature met and enacted S.B. 60. That legislation is undisputably intended to put in place a revision to the Utah law "providing for a 24 hour waiting period prior to most abortions..." Title to S.B. 60, Laws of Utah 1993, Chapter 70. The legislation was closely, and almost slavishly, lifted from the Pennsylvania law that was reviewed by the Supreme Court in *Planned Parenthood v. Casey, supra*. S.B. 60 was not a comprehensive reworking of the Utah abortion provisions, but an addition and change to existing law. Therefore, the Utah law is composed of various pieces of legislation enacted over a course of time. However, only the constitutionality of S.B. 60 is before the court in this litigation. However, some other parts of the Utah law are interrelated with S.B. 60 and must be considered in evaluating the plaintiffs' claims.

The Request for Reference to the Utah Supreme Court

In plaintiffs' memorandum a suggestion has been made that this court should consider referring this case to the Utah Supreme Court for a decision on the meaning of certain provisions of the Utah law. (Plaintiff's memorandum of June 10, 1993 p.41). The plaintiffs contend the statute has ambiguities as to whether the requirement of oral advice means face to face advice from the designated care provider

or whether the advice may be given by telephone or other oral method. Plaintiffs raise questions as to informing the woman of the gestational age of the fetus, and whether the rape exception in Utah Code Ann. § 76-7-305(1)(c)(iii) requires the rape be reported.[21] These claims are without merit. Normal standards of statutory interpretation provide the answers to all the concerns addressed. The plaintiffs seem to be deliberately raising ghost obstacles to the ability of a woman to obtain an abortion in compliance with S.B. 60. The fact that plaintiff Alissa Porter requested an interpretation from the Attorney General of S.B. 60, which was declined is of no consequence. The Attorney General is not obligated to provide legal advice to individual citizens.[22] The Attorney General's opinion is not binding on the courts and would be of limited value. It creates no precedent. In this case the Attorney General is obligated to defend the statute and Alissa Porter was a person obviously likely to challenge the statute. It was therefore most proper for the Attorney General to decline to interpret the statute for an interested private person.

Further, the referral of various matters to the Utah

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[21]No such requirement is specified in the statute. Rape does not require corroboration for prosecution of the crime. State v. Templin, 805 P.2d 182 (Utah 1990); State in Interest of J.F.S., 803 P.2d 1254, 1259 (Utah App. 1990). It would strain the plain meaning of the statute to require proof beyond the woman's good faith statement.

[22]Article 2 § 16, Utah Constitution establishes the duties of the Utah Attorney General and provides the Attorney General is the legal adviser to "State officers." See Hansen v. Utah State Retirement Bd., 652 P.2d 1332 (Utah 1982). Utah Code Ann. § 675-1 et seq. sets forth the duties of the Attorney General. Nothing in these provisions obligates the Utah Attorney General to give legal advice to private citizens.

Supreme Court would further delay the resolution of this case, and, if proper, the implementation of the statute. The parties have a right to have proceedings decided without unjustifiable delay. A decision from the Utah Supreme Court would not resolve the basic constitutional issues or afford the parties full relief. It is therefore, inappropriate to refer the matter to the Utah Supreme Court.

The question of whether to certify an issue or defer to a state court is a matter of discretion for the federal court. See *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978); *Lehmen Bros. v. Schein*, 416 U.S. 386 (1974); *Allstate Ins. Co. v. Brown*, 920 F.2d 664, 667 (10th Cir.1990) ("The decision to certify rests in the sound discretion of the federal district court"); *Armijo v. Ex. Cam. Inc.*, 843 F.2d 406, 407 (10th Cir.1988); *Albright v. Board of Education of Granite School District*, 765 F.Supp. 682, 690 n.19 (D.Utah 1991). Further, "Certification is not to be routinely invoked whenever a federal court is presented with an unsettled question of state law.' *Armijo*, 843 F.2d at 407. Only if the state statute might be construed to avoid the constitutional issue would certification be appropriate. E.g., Douglas v. Seacoast Prods. Inc. , 431 U.S. 265, 271 n.4 (1977). There is no suggestion the resolution of the alleged ambiguities identified by plaintiffs would result in the withdrawal of the constitutional challenge. Plaintiffs' constitutional challenge is addressed to provisions of the Utah statute that are reasonably clear. Also, state law is not necessarily controlling on constitutional issues, which is the basis for certification to state court. *Parcell v. Governmental Ethics Com'n.*, 626 F.2d 160 (10th Cir.1980). Certification is to be utilized with restraint and is inappropriate where it would not resolve the issues. *Ormsbee Development Co. v. Grace*, 668 F.2d 1140, 1149 (10th Cir.1982). Most recently in *Anaconda Minerals Co. v. Stoller Chemical Co.*, 990 F.2d 1175 (10th Cir.1993) the court stated that certification to a state court would be

made only if "questions are both unsettled and dispositive." *Id.* at 1177. In *Grant v. Meyer*, 828 F.2d 1446 (10th Cir.1987) the court said certification to state court would not be appropriate where the criminal statute was not questioned under state law. *Id.* at 1448 n.5. If the state court interpretation would be determinative, certification would be proper. *In re Fingado*, 955 F.2d 31 (10th Cir.1992). However, in this case, such a circumstance does not exist. The plaintiff has not asserted supplementary jurisdiction. See 28 U.S.C. § 1367. In *Wilson v. Stocker*, 819 F.2d 943 (10th Cir.1987) the court addressed the issue of overbreadth of a state statute restricting distribution of anonymous campaign literature. The court stated:

> When the state court has not construed or interpreted the statute, however, a federal court is relegated to the words of the act itself, because "it is not within our power to construe and narrow state laws." *Id.* at 948.

(citing *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)). However, when a First Amendment overbreadth issue is not involved, as is the situation in this case, a different standard applies:

> We have not found any controlling New Mexico law on the question of whether a plaintiff, by instituting an action, waives the defense of the statute of limitations to a compulsory counterclaim asserted after expiration of the applicable period of time. Thus, we must construe the law of the State of New Mexico in a manner in which the Supreme Court of New Mexico would so construe if faced with similar facts and issues. *City of Aurora Colorado v. Bechtel Corp.*, 599 F.2d 382 (10th Cir.1979). In so doing, we may consider all

> resources, including decisions of New Mexico, other states, federal decisions, and the general weight and trend of authority. *Burgert v. Tietjens*, 499 F.2d 1 (10th Cir.1974).

Hartford v. Gibbons & Reed Co., 617 F.2d 567 (10th Cir.1980). See also *Farmers Alliance Mut. Ins. Co. v. Bakke*, 619 F.2d 885, 888 (10th Cir.1980); *Holler v. United States*, 724 F.2d 104, 105 (10th Cir.1983) ("Where there is no state law in point, the federal court must determine what the state Supreme Court likely would do when faced with a similar case."); *Weiss v. United States*, 787 F.2d 518, 525 (10th Cir.1986)(same); *Herndon v. Seven Bar Flying Service, Inc.*, 716 F.2d 1322 (10th Cir.1983) (federal court should try to anticipate what the state court will do); *Hartford v. Gibbons & Reed, supra* (same); *W.S. Ranch Co. v. Kaiser Steel Corp.*, 388 F.2d 257 (10th Cir.1967), *rev'd on other grounds*, 391 U.S. 593 (1968).

In two decisions from this district, the issue has been addressed. In *O'Driscoll v. Hercules, Inc.*, 745 F.Supp. 656, 660 (D.Utah 1990), the Chief Judge of this District stated:

> Where no state court has addressed clearly the substantive law of the state upon which summary judgment is granted, federal courts must predict how the state's highest court would rule. *Weiss v. United States*, 787 F.2d 518, 525 (10th Cir.1986). "The federal court should consider state court decisions, decisions of other states, federal decisions, and the general weight and trend of authority." *Armijo v. Ex Cam inc.*, 843 F.2d 406, 407 (10th Cir.1988).

In a second opinion, *Schape v. Zions First Nat. Bank*, 750 F.Supp. 1084, 1087-88 (D.Utah 1990) the same

conclusion was reached.

Federal courts are not precluded from affording relief simply because neither the state Supreme Court or the legislature has expressed a completely clear policy in the controversy. *Paul v. Watchtower Bible & Tract Soc. of New York*, 819 F.2d 875, 879 (9th Cir.1987). See also *United States v. Wyoming Nat. Bank*, 505 F.2d 1064 (10th Cir.1974); *Amos v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 594 F.Supp. 791 (D.Utah 1984).

Therefore, under the circumstances of this case certification of issues to the Utah Supreme Court is inappropriate and this court will apply the above principles in construing the substance of S.B. 60.

Inconsistent Health Exceptions Contention

The plaintiffs contend the Utah abortion law provides four inconsistent provisions relating to health exceptions in S.B. 60, and allied provisions, and therefore the law violates due process. First, the plaintiff states Utah Code Ann. § 76-7-305 (1), treating informed consent, does not clearly apply in the case of a medical emergency as defined in § 76-7-301(2). Plaintiffs also complain that Utah Code Ann. 76-7-315 (preexisting law) provides that if there is a "*serious* medical emergency" and time does not permit compliance with section 76-7305(2)(not 305(1)) then the advice provisions of § 305(2) do "not apply." The plaintiffs assert the relationship is confusing and unclear.

It is plaintiffs' claim that use of defined term "medical emergency" and the undefined term "serious medical emergency" creates different, confusing, unconstitutional standards. The term "medical emergency" applies to specific

parts of S.B. 60. The term "serious medical emergency" applies only to the circumstance where the medical emergency is so severe that time does not permit the physician to tell the woman why the abortion must be performed, which would normally be required in a medical emergency situation. Utah Code § 76-7-305(2). § 76-7-315 excuses application of § 305(2) in the case of serious medical emergency. The two provisions, "medical emergency" and "serious medical emergency" do not have overlapping applications but apply to different functions and situations.

Utah Code Ann. § 76-7-305(2) refers to a "medical emergency" which compels an abortion. In such circumstances the physician is to inform the patient, if possible, of the "medical indications supporting his judgment that an abortion is necessary ..." The plaintiffs suggest it is unclear if the definition of "medical emergency" applies to the situation where the abortion is medically compelled. S.B. 60 sets forth a definition of medical emergency which applies to its provisions. Utah Code Ann. § 76-7-301(2) and § 76-7-305(2) (relating to when a medical emergency compels an abortion). The definition of medical emergency obviously applies to § 76-7-305(2). Plaintiffs' argument to this matter lacks serious substance.

An additional challenge is made to the provisions of Utah Code Ann. § 76-7-305(4) which provides a physician is not guilty of a violation of § 76-7-305 for failure to provide the mandatory counseling "if he can demonstrate by a preponderance of the evidence that he reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient." This provision relates to the obligation to give information to the woman seeking an abortion. It is an

exception to criminal liability imposed by the requirement that the woman receive the information specified in § 76-7-305(1)(a)(b)&(c). If the information is not given, § 76-7-305(4) is an available defense. Plaintiffs allege this is confusing.

Violating the provisions of the abortion statute carries criminal sanctions. Utah Code Ann. § 76-7-314(1)(a); § 76-3301(1)(b); § 76-3-203(3). Clinics which violate the law may also be criminally sanctioned. Utah Code Ann. § 76-2-204(1) (responsibility of corporations). The sanctions drawn from a violation of Utah Code Ann. § 76-7-305.5(3)&(4), referenced in plaintiffs' brief, apply to clinics which are required to provide informed consent materials and to provide notice of the supplementary materials described in § 305.5(1). § 76-7-305(4) provides a defense to the provider who does not comply with the information requirement.

The plaintiffs contend the provisions violate due process in relation to criminal abortion statutes because the exceptions which allow an abortion are insufficiently broad to provide a workable health exception to the statutory requirements. Plaintiffs contend a broader exception is required by *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992) and that S.B. 60 otherwise violates due process because its provisions are unconstitutionally vague and do not give fair notice of what conduct is prohibited. The defendants contend the language of the statute's terms is clear and unambiguous and is of the same dimension as that specifically upheld in *Casey* and specifically in the Court of Appeals' opinion in *Planned Parenthood v. Casey*, 947 F.2d 682, 702 (3rd Cir.1991).

The Casey Precedent

The plaintiffs contend that under the Supreme Court's

decision in *Casey*, 112 S.Ct. at 2822 that a "clear and workable" health exception to the delay and advice provisions is necessary to support the constitutionality of S.B. 60.

Utah Code Ann. § 76-7-301(2) defines medical emergency as:

> that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death, or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.

The definition bears a very close identity to the provisions of 18 Pa. Cons. Stat. § 3203 (1991) which was involved in and upheld by *Casey*, *supra* at 2822. The plaintiffs in this case make a generalized statement that the provision fails to clearly and unambiguously permit physicians to perform immediate abortions where continued pregnancy would constitute threat to a woman's health. The plaintiff then refers to alleged defined standards in other provisions of the Act. This argument is without merit.

The only issue as to S.B 60 is as to the definitions that apply to that legislation.

That is the specific challenge plaintiffs have raised. The statute's use of such terms as "serious risk," "impairment of major bodily function" and "severely adverse effect" (§ 305(4)) is not ambiguous. These are terms with medical content and are to be evaluated against the "physician's good faith clinical judgment." Would a physician exercising good faith judgment consider that there was a "serious risk"

of "impairment of a major bodily function" if an abortion were not performed? Could a physician, in good faith, believe such a condition existed in a woman that warranted an abortion? If so a "medical emergency" exists and the exception applies. The subjective "good faith" judgment standard applies against an objective standard of the reasonable physician's training and experience based on the physician's clinical judgment. The term medical emergency is actually as broad as the medical circumstances that require the abortion to "avert her death, or for which delay will create serious risk of substantial and irreversible impairment of major bodily function.[23] The provision does not require a woman to risk that which is substantial and harmful. Medical judgment dictates the need to apply the exception.[24]

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[23]This would include all the complications identified and set forth in the submission of Alissa Porter, if those conditions would meet the medical emergency standard. It includes the specific pathologies noted in Casey as within the term "medical emergency" and anything else necessary to avert death or risk of substantial irreversible impairment.

[24]Plaintiffs in their memorandum of June 10, 1993 p.5 n.5 question whether the "syntactical structure" of § 76-7-301(2) allows the term "good faith clinical judgment" to modify the provisions after "avert her death," which encompasses serious risk of substantial and irreversible impairment of major bodily function. The plaintiffs are correct that as a grammatical matter, the comma after- the word "death" would allow an interpretation to the contrary. However, in construing a statute, the primary rule of statutory interpretation is to give effect to the intent of legislature in light of the purpose the statute was meant to achieve. Reeves v. Gentile, 813 P.2d 111 (Utah 1991); Board of Educ. of Granite School Dist. v. Salt Lake County, 659 P.2d 1030 (Utah 1983). It is also important to avoid potential constitutional conflicts. State v. Casarez, 656 P.2d 1005 (Utah 1982). A court should look to reason, spirit, and sense of the legislation as indicated by its entire context. Reagan Outdoor Advertising Inc. v. Utah Dept. of Trans., 589 P.2d 782 (Utah 1979). A statute will not be interpreted literally in its grammatical (continued...)

In *Casey* the Supreme Court addressed the same issue as to the Pennsylvania statutory definition of "medical emergency" which very closely parallels § 76-7-301(2). The Court said:

> Petitioners argue that the definition is too narrow, contending that it forecloses the possibility of an immediate abortion despite some significant health risks. If the contention were correct, we would be required to invalidate the restrictive operation of the provision, for the essential holding of *Roe* forbids a State from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health. 410 U.S., at 164, 93 S.Ct., at 732. See also *Harris v. McRae*, 448 U.S. at 316, 100 S.Ct. at 2867.
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> The District Court found that there were three serious conditions which would not be covered by the statute: preeclampsia, inevitable abortion, and premature ruptured membrane. 744 F.Supp., at 1378. Yet, as the Court of Appeals observed, 947 F.2d at 700701, it is undisputed that under some circumstances each of these conditions could lead to an illness with substantial and irreversible consequences. While the definition could be interpreted in an unconstitutional manner, the Court of Appeals construed the phrase "serious risk" to

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[24](...continued)
context if it would make the statute unreasonably confusing or inoperable. Amax Magnesium Corp. v. Utah State Tax Com'n, 796 P.2d 1256 (Utah 1990). Applying these principles of construction it is apparent the term "good faith clinical judgment" in § 76-7-301(2) applies to all the provisions of the definition of "medical emergency."

include those circumstances. *Id.*, at 701. It stated: "we read the medical emergency exception as intended by the Pennsylvania legislature to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman" *Ibid.* As we said in *Brockett v. Spokane Arcades Inc.*, 472 U.S. 491, 499500, 105 S.Ct. 2794, 2799-2800, 86 L.Ed.2d 394 (1985): "Normally, ... we defer to the construction of a state statute given it by the lower federal courts." Indeed, we have said that we will defer to lower court interpretations of state law unless they amount to "plain" error. *Palmer v. Hoffman*, 318 U.S. 109, 118, 63 S.Ct. 477, 482, 87 L.Ed. 645 (1943). This "'reflect[s] our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States.'" *Frisby v. Schultz*, 487 U.S. 474, 482, 108 S.Ct. 2495, 2501, 101 L.Ed.2d 420 (1988) (citation omitted). We adhere to that course today, and conclude that, as construed by the Court of Appeals, the medical emergency definition imposes no undue burden on a woman's abortion right.

The Utah statute must be construed in the same manner.[25] Any disease or physical condition meets the medical condition necessary for application of the medical emergency exception if the physician in good faith believes

[25]Where the Utah Legislature adopted the statue from Pennsylvania, the Utah legislature must have intended the prior judicial construction to also be adopted. Jensen v. Intermountain Health Care, Inc., 679 P.2d 903, 904 (Utah 1984); Benned Ass'n. v. Utah State Tax Commission, 19 Utah 2d 108, 426 P.2d 812 (1967); Andrus v. Allred, 17 Utah 2d 106, 404 P.2d 972 (1965); State v. Hunt, 13 Utah 2d 32, 368 P.2d 201 (1962); State v. Johnson, 12 Utah 2d 220, 364 P.2d 1019 1961).

the condition justifies the abortion and is within the statutory standards. The exception will accommodate the judgment of a physician which in light of medical training and experience requires the abortion without complying with S.B. 60.

A physician would only be subject to prosecution if the physician acted in bad faith with the requisite state of mind for a criminal offense which is otherwise specifically defined by the statute. The requisite actus reus for an offense punishable as a crime would also have to exist. Utah Code Ann. § 76-7-314(1)(a) requires a specific mental element (intentionally is the mental element for a violation of the abortion statute). Utah Code Ann. § 76-2-103(1) defines intentionally for purposes of the Utah Criminal Code. Historically, abortion has been a "specific intent" crime, Perkins & Boyce, *Criminal Law* 3d Ed. 191 (1982)

Due Process and Vagueness

The plaintiffs contend the various provisions of the Utah abortion statute dealing with medical emergencies are so vague and ambiguous as to violate due process. Plaintiffs base their claim on the assertion of conflicting or confusing "health exceptions" in the Utah statute. The plaintiffs also contend the conflicting provisions are themselves internally ambiguous thereby making the statute irreparable and unconstitutional. These provisions have been identified previously, and the various applications noted.

Defendants contend that part of the challenged Utah statutory provisions have previously been declared not to be vague and to be constitutional by Judge Greene in *Jane L. v. Bangerter*, 809 F.Supp. 865, 877-880 (D.Utah 1992)(rejecting a vagueness challenge to 5 767-315). Defendants contend that the challenged provisions otherwise

have a clear and unambiguous application.

In assessing the constitutionality of a criminal statute against a claim of denial of due process, the required standard is that a penal statute define the criminal offense with sufficient definitiveness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 356, 357 (1983). *Baggett v. Bullitt*, 377 U.S. 360 (1964). The danger of vagueness was stated in *Grayned v. City of Rockford*, 408 U.S. at 108-109:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Minimal guidelines must be established to govern the conduct of law enforcement. *Kolender*, 461 U.S. at 358. *Smith v. Goguen*, 415 U.S. 566, 574 (1974). See also *United States v. Agnew*, 931 F.2d 1397 (10th Cir.1991); *United States v. Pinelli*, 890 F.2d 1461 (10th Cir.1989). To successfully challenge the statute it must be shown that the statute as written would fail to alert the average person of the prohibited conduct. *Brecheisen v. Mondragon*, 833 F.2d 238 (10th Cir.1987). This case involves only a facial challenge to the Utah abortion law within the standard for

review declared in *Casey*, *supra*. The statute may however use language and terminology of the group or class to whom it is directed. See *Parker v. Levy*, 417 U.S. 733 (1974). "The constitution does not require impossible standards of specificity in penal statutes. It requires only that the statute convey sufficiently definite warning as to the proscribed conduct when measured by common understanding." *United States v. Petrillo*, 332 U.S. 1, 7 (1947). The standard is not one as to the doubts of application in marginal cases but its general application. *United States v. Powell*, 423 U.S. 87 (1975).

When the defendant is a member of the special class to whom the legislation is directed, the terminology that is understood by the group and within their understanding and discretion is constitutional. *E.g., Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). The mere fact that the statute could have been better crafted, or drafted with greater precision or clarity, does not violate due process. *Rose v. Locke*, 423 U.S. 48 (1975).

Further, as Judge Greene noted in *Jane L.*, 809 F.Supp. at 878, plaintiffs "must establish that the challenged law is 'impermissibly vague in all its applications'," citing *Village of Hoffman Estates v. Flipside, Hoffman Estates Inc.*, 455 U.S. 489, 497 (1982).[26] This case does not present a First Amendment question and this stated standard is applicable to the vagueness claim.

The plaintiffs properly place support for their position of unconstitutionality on *Colautti v. Franklin*, 439 U.S. 379, 391 (1979). The case involved the constitutionality of a

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[26]The standard applies to a facial challenge not involving First Amendment overbreadth questions. See Jane L., 878 F.Supp. at 878 & n.33.

previous Pennsylvania Abortion Control Act (Act No. 209, 1974). The statute subjected a physician who performed an abortion to potential criminal liability for the failure to utilize a directed technique when the fetus was "viable" or when there was "sufficient reason to believe the fetus may be viable." 430 U.S. at 380-81. The Supreme Court determined the viability determination requirement of the statute to be void for vagueness. The court found the statute to be ambiguous as to:

> whether there must be "sufficient reason" from the perspective of the judgment, skill, and training of the attending physician, or "sufficient reason" from the perspective of a cross section of the medical community or a panel of experts. The latter, obviously, portends not an inconsequential hazard for the typical private practitioner who may not have the skills and technology that are readily available at a teaching hospital or large medical center.

Id. at 391-92. Other vague terminology such as "may be viable" was referred to the court as "elusive." *Id.* at 392. The court also found the statute "does not afford broad discretion to the physician." *Id.* at 394. Further, the physician could be subjected to "criminal liability without regard to fault." *Id.* at 394-95. The standard of care to preserve the life and health of the fetus was also found to be vague. Many of the *Colautti* concerns are not applicable in this case. *Colautti* is a different statute with application in a different context. The *Colautti* case will be discussed as it bears on the-discussion of the Utah statute. However, as noted before, the Utah statute provides a complete subjective defense for the physician or abortion provider in determining a medical emergency. Also, a specific mens rea is required in the Utah law. The language of the Utah

statute accommodates physician discretion. If the physician acts in good faith based on clinical judgment there is no criminal sanction. Also Utah Code Ann. § 76-7-305(4) provides:

> A physician is not guilty of violating this section, for failure to furnish the information described in Subsection (1), if he can demonstrate by a preponderance of the evidence that he reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient.

Thus, a physician's reasonable belief is a defense to the very failure to provide the requisite information in the first place, absent a medical emergency, if the physician reasonably believed the furnishing of the information would have severely adversely effected the physical or mental health of the patient. The Utah statute provides much greater breadth and discretion to the physician than that found inadequate in *Colautti*. Further, *Colautti* involved the very significant function of performing an abortion. The provisions of § 76-7-305(1) and (4) relate not to performing an abortion but to meeting a waiting period and providing information to women considering an abortion relevant to the woman's exercise of the choice to abort. See Utah Code Ann. § 76-7-305(1)&(4). These differences of function are important in assessing the adequacy of the notice given the physician. The context of the legislation bears on the due process requirement of notice. The Court of Appeals in *Casey*, 947 F.2d at 702 rejected a vagueness challenge to the Pennsylvania medical emergency provision and found *Colautti v. Franklin*, *supra*, not to be applicable precedent. The same reasoning as to the inapplicability of *Colautti* applies in this case.

As previously stated the language of "medical emergency" defined in 76-7-301(2) is sufficiently clear that a physician would know what he or she is to do and also the standard provides for flexibility of judgment so that § 76-7-301(2) does not run contrary to due process standards. *Kolender v. Lawson, supra*; *Parker v. Levy, supra*. However, it still must be determined whether the challenge to when the definition applies[27] is valid.

The first instance where the medical emergency terms of § 76-7-301(2) excuse the requirements for providing the statutory information otherwise applicable is in § 76-7-305. This relates to voluntary abortion where the physician is restricted in performing the abortion for twenty-four (24) hours and the physician must provide the woman information related to the abortion. Since the definition of medical emergency is not impermissibly vague, the application of its definition to excuse the waiting period and from providing information is not vague or uncertain. There is no *Colautti* problem in this instance.

Utah Code Ann. § 76-7-305(2) provides that when a medical emergency compels the performance of an abortion the physician should inform the woman; if possible, of the medical indications supporting the physician's judgment that an abortion is necessary to avert death or substantial and irreversible impairment of a major bodily function. In this

[27]Plaintiffs have provided opinions of physicians as to the vagueness of the statutory provisions. However, these have been conclusory, argumentative, generalized, and subjective. The real issue is how the sections of the statute relate to one another. If this is coherent, the fact that understanding the relationship may be complex does not make the statute vague. See United States v. Dischner, 960 F.2d 870 (9th Cir.1992) (RICO statute 18 U.S.C. § 1961-63 is not unconstitutionally vague.)

context, medical emergency is used as to when an abortion is necessary and merely says in such circumstances, if it is possible, the physicians should tell the woman why the physician believes the circumstances require the abortion. This standard is not ambiguous. The term "medical emergency" under § 76-7-305(2) triggers an obligation simply to inform the patient as to why the abortion is necessary. This does not unduly burden the abortion process or create an ambiguous situation. It does not have a relationship to the undue burden standard as to the women's choice to abort. If the patient is comatose or otherwise impaired or there is a need in the physician's judgment to act before reasons can be provided to the woman, nothing need be said to her. This provision also does not involve any of the concerns that the Supreme Court felt invalidated the legislation in *Colautti*.

The third concern urged by plaintiffs relates to how the term "serious medical emergency" in Utah Code Ann. § 76-7-315 (which is preexisting legislation and not apart of S.B. 60) effects S.B. 60's provisions. The state does not accept a possible repeal by implication,[28] but asserts the provisions

[28]At oral argument the Utah Attorney General quickly and somewhat cavalierly, rejected the possibility of implied repeal. Admittedly, implied repeal is not favored. State v. Sorenson, 617 P.2d 333 (Utah 1980). However, implied repeal will be found if a later statute is clearly inconsistent with a former provision, Thiokol Chemical Corp. v. Peterson, 15 Utah 2d 355, 393 P.2d 391 (1964), or if statutes cannot be reconciled, Salt Lake City v. Towne House Athletic Club, 18 Utah 2d 417, 424 P.2d 442 (1967). In this case the provisions of Utah Code Ann. § 76-7-305(2) were originally adopted with § 76-7-315 and were later amended in 1991. It seems to have clearly been superseded by S.B. 60 in 1993. The failure to modify § 76-7-315 appears to be a legislative oversight and implied repeal could be a reasonable argument. However, in light of the Attorney General's position, the court will not address the application of implied repeal.

of § 76-7-315 are compatible with the general scheme of the abortion legislation. Section 76-7-315 in its relevant part provides that "when due to a *serious* medical emergency, time does not permit compliance with Section ... 76-7-305(2) the provisions "do not apply." Contrary to the defendants' claim there is an arguable ambiguity with the express provisions of § 76-7-305(2) which require advice except where not possible. § 76-7-305(2) by its terms does not apply if it is not "possible" to give the advice. The defendants argue § 76-7-315 also excuses advice if there is a serious medical emergency. Indeed, this is what the provisions suggest. This part of the Utah statute is *badly* drafted. § 76-7-305(2) says when a medical emergency compels the performance of an abortion the reasons why shall be provided "if possible." The logical corollary is if it is not possible, the advice need not be given. § 76-7-315 states that in a serious medical emergency the advice need not be given. The provisions overlap. Does this render this provision unconstitutionally vague? Bad draftsmanship is not necessarily concomitant with unconstitutionality. The mere fact the legislature could have done a better job of drafting and made the statute more precise or clear is not the standard. *United States v. Powell, supra.* Vagueness concepts may be tested by the same standard when it comes to excuses or justifications which are available to the statute's general application. Paul H. Robinson, *Criminal Law Defenses.* § 35(a)(1984) but see § 35(b)(3)("arguably, these fair notice doctrines should also frequently apply to justifications."). Also see § 35(b)(4) (noting that excuses are of different nature and doctrines of "fair notice are not properly applicable to excuses").

However, these intricacies of criminal law need not be analyzed or resolved at this time. § 76-7-315 *excuses* the giving of the required information as to the reason for the emergency abortion if the medical-emergency has the

additional factor of being "serious." In *Jane L. v. Bangerter*, 809 F.Supp. at 877-880, it was held:

> With regard to the argument that the term "serious medical emergency" has no core meaning, it is apparent to the Court that physicians routinely are confronted with emergencies and as a part of their training can recognize them. In a prior Memorandum Decision and Order in this case, this Court followed Supreme Court precedent in finding a core meaning for such terms as "necessary to save a mother's life" and "grave damage to the woman's medical health," because definition of these terms is a "routine question for the professional judgment of the attending physician." *Jane L. v. Bangerter*, 794 F.Supp. 1537, 1542 (D.Utah 1992).

According to this interpretation, a serious medical emergency, read in conjunction with S.B. 60, means one beyond the statutory definition of "medical emergency" set forth in § 76-7-301(2) that is so serious a physician would understand the need to act without explanation to the woman. This is a matter within the sound judgment of the physician, and only where the physician acted in bad faith, intentionally, and under circumstances that could not be considered a *serious* medical emergency by any reasonable physician would the exception of § 76-7-315 not be an available excuse.[29] This is a rational and harmonious

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[29]During oral argument the Assistant Utah Attorney General argued the excuse of serious medical emergency was simply another special circumstance when the advice requirements of § 76-7-305(2) need not be complied with. However, during argument the Assistant Attorney General failed to provide a clear differentiation of medical emergency

(continued...)

construction which the Utah Supreme Court would probably adopt. *Ellis v. Utah State Retirement Board*, 757 P.2d 882 (Utah App. 1988), *aff'd*, 783 P.2d 540 (Utah, 1988); *Jerz v. Salt Lake County*, 822 P.2d 770 (Utah 1991).

Although § 76-7-315 is ambiguously drafted, it is not so vague in the context of an excuse, that it is unconstitutionally vague. As Judge Greene observed, a reasonable physician would know, in the context of the medical emergency, when it is sufficiently serious enough that § 76-7-305(2) need not be complied with. Certainly this is not such an irrational construction that § 76-7-315 would be unconstitutional in all applications. *Flipside*, *supra*. *Flipside* is the standard for determining a facial challenge of vagueness.

Further, this provision, if it could be concluded to be contrary to *Colautti's* vagueness concerns, is easily severable from the rest of the statute and § 76-7-315 as it applies to § 76-7-305(2) could simply be declared void leaving §§ 76-7-305(2) as the applicable provision. The rest of S.B. 60 would not be effected. This however is not a necessary conclusion.

The final claim of unconstitutional ambiguity relates to Utah Code Ann. § 76-7-305(4). This provision was recently enacted by S.B. 60. The section provides:

> A physician is not guilty of violating this section, for failure to furnish the information described in Subsection (1), if he can demonstrate by a preponderance of the evidence that he

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[29](...continued)
and serious medical emergency.

> reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient.

The plaintiffs suggest there is an ambiguity between § 76-7-305(4) and §§ 76-7-301(2) and 305(1). §§ 76-7-301(2) defines medical emergency and section 305(1) excuses compliance with the twenty four hour waiting period and the advice provisions where a medical emergency exists. § 76-7-305(4) is an entirely separate provision.

§ 305(4) is applicable only when there has been a failure to comply with the information section. It provides an "affirmative defense" to a criminal charge if the physician is able to convince the trier of fact by a preponderance of the evidence that the physician entertained a reasonable belief that severe adverse effects would occur if the information otherwise required to be given to the patient were not withheld. There is nothing vague about the circumstances under which the provision applies. There is nothing unconstitutional in the Utah Legislature establishing an affirmative defense with the burden on the defendant physician. *Leland v. Oregon*, 343 U.S. 790 (1952); *Patterson v. New York*, 432 U.S. 197 (1977); *Martin v. Ohio*, 480 U.S. 228 (1987). There is no merit to a claim of vagueness as to § 305(4). There is no overlap between § 76-7-305(4) and the other provisions on medical emergency. It stands as an independent provision setting up an affirmative defense.

The plaintiffs' claim that the provisions of S.B. 60 relating to the medical emergency exceptions and allied sections is unconstitutional, must be rejected.

<u>Undue Burden on a Woman's Right to Abortion</u>

The plaintiffs complain that S.B. 60 requiring a twenty-four hour waiting period for most abortions and mandatory counseling for most women considering abortion unduly burdens a woman's constitutional right to an abortion.

There is no question that a woman in many instances has a constitutional right to elect to have an abortion based on the woman's constitutional right to privacy. *Roe v. Wade*, 410 U.S. 113 (1973) As to *Roe* when viewed *sui generis* "there clearly has been no erosion of its central determination."[30] *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2810 (1992). See also *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). However, the right to an abortion is not absolute and defendants contend the restrictions of S.B. 60, patterned very closely after the Pennsylvania law upheld in *Casey*, do not offend due process. The defendants place substantial reliance on the fact that S.B. 60 was drafted from the Pennsylvania statutory provisions and that the Utah Legislature obviously closely patterned its approach as to the waiting period and information to be given to women contemplating an abortion from Pennsylvania. Defendants contend *Casey* has resolved the constitutionality of the Utah law.

The defendants also contend that the standards of *United States v. Salerno*, 481 U.S. 739, 745 (1987) are to be used by this court and it must find the law constitutional unless plaintiffs prove that no set of circumstances exist under which the Utah law could be constitutionally applied.

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[30]The woman's right to an abortion in accordance with the standards of Casey is now firmly entrenched. The right exists as a matter of the woman's due process right to privacy. There will be no return to the tragic circumstances that existed before Roe v. Wade, supra. See for example Patricia G. Miller, The Worst of Times (1993).

The plaintiffs contend that *Salerno* is not the proper standard to be used in making the constitutional assessment required by *Planned Parenthood v. Casey, supra*. They contend *Casey* set a new standard to be applied in abortion cases. In *Casey* the Supreme Court seemed to adopt a different standard of review of the constitutionality of abortion legislation. The court appeared to reject the *Salerno* position in the case of constitutional challenges to abortion statutes and to approach the matter from the standpoint of the effected category of women. "The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.' *Casey* at 112 S.Ct. at 2829. Justice O'Connor has since had an opportunity to comment on the intention in *Casey*. In, *Fargo Women's Health Org. v. Schafer*, 113 S.Ct. 1668, 1669 (1993) Justice O'Connor observed:

> In striking down Pennsylvania's spousal-notice provision, we did not require petitioners to show that the provision would be invalid in *all* circumstances. Rather, we made clear that a law restricting abortions constitutes an undue burden, and hence is invalid, if, "in a large fraction of the cases in which [the law] is relevant it will operate as a substantial obstacle to a woman's choice to undergo an abortion."

The standard is believed to be the correct application of the standard of constitutional review in this case.[31] In that

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[31]This conclusion is reached in spite of the statement in Ada v. Guam Society of Obstetricians and Gynecologists, 113 S.Ct. 633 (1992) in which Justices Scalia, White, and Chief Justice Rehnquist dissented from the denial of certiorari to review the constitutionality of the Guam abortion law and argued that the traditional rule for a facial challenge of

(continued...)

regard, this court has considered the submissions of the parties on whether the Utah legislation infringes on the rights of the effected class of women in Utah. The class is women who wish to obtain or who are therapeutically required to obtain an abortion in Utah.

In determining whether the class is unduly burdened the first step is to consider the constitutionality of the twenty-four (24) hour waiting period. Utah Code Ann. § 76-7-305(1)(a) requires that at least "24 hours prior to the abortion, the physician who is to perform the abortion, the referring physician, a registered nurse, nurse practitioner,-advanced practice registered nurse, certified nurse midwife, or physician's assistant" provide a woman with information set forth in the statute. It should be noted the statute does

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[31](...continued)
the constitutionality of a statute is whether "there exists no set of circumstances in which the statute can constitutionally be applied." Id. at 634. The three justices were in the minority in Casey, 112 S.Ct. at 2800, and their refusal to accept Casey's holding on this issue seems unpersuasive. This position is taken in this case in spite of the contrary conclusion of the Fifth Circuit in Barnes v. State of Mississippi, 992 F.2d 1335, 1343 (5th Cir.1993). The issue was not critically considered in Barnes. In fact, it was not discussed in terms of Casey's holding.

The very nature of the undue burden standard, requiring as it does a substantial obstacle which must encompass a significant group, requires some analysis of the potential operative effect within the area of an abortion statute's application. See Planned Parenthood v. Casey, 822 F.Supp. 227 (E.D. Pa. 1993).

Also, the district court has allowed submissions by the parties with the obvious purpose of determining whether the Utah law does impose an undue burden in the context of its probable application as taken from the facial language of the statute. Therefore, the Salerno approach will not be utilized in the analysis of the constitutionality of the 24 hour waiting period and the informed consent provisions in the Utah abortion statute.

not purport to have any extraterritorial application nor does it require higher standards or longer delay for women who reside outside of Utah than for those who are Utah residents. *Cf. Doe v. Bolton*, 410 U.S. 179 (1973). There is nothing in the way of interstate limitation in the Utah statute. Any effect on any woman would be indirectly based on her circumstances, not the law itself. Laurence H. Tribe, *American Constitutional Law* 533-545 (2d ed. 1988). *Hughes v. Oklahoma*, 441 U.S. 322 (1979). There is nothing that imposes any restriction on women outside of Utah from obtaining an abortion in Utah. All women seeking an abortion in Utah are treated the same and subject to the medical emergency. There is no residency requirement that would offend the right to travel. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Jones v. Helms*, 452 U.S. 412 (1981). See also *Edwards v. California*, 314 U.S. 160, 170 (1974); *Doe v. Bolton, supra*. See recently *Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753, 763 (1993).

Further, the statute does not require anything other than a short period of delay, with an exception for medical emergencies.

The plaintiffs have presented some evidence that the burdens of travel may be greater for women who come into Utah and the expense greater. Most of the statements are anecdotal and show very subjective reasons for the women not seeking services in the state of their residence. In some cases, Salt Lake City is the "hub" service center for rural areas of other states. These circumstances do not come up to the level of an undue burden or substantial obstacle. Further, they are not caused by the Utah law but the living circumstances of the affected women. The circumstances may create an inconvenience but not a substantial obstacle. Dr. Watson's submission as well as Alissa Porter's statement show that current circumstances, absent the Utah

law will frequently require a one or two day waiting period.

Denise Defa states in her submission, *supra* pp. 30-32, that an abortion is never performed on the same day as the decision making session. The 24 hour waiting period is not incompatible with current provider practice in some cases In *Planned Parenthood v. Casey*, *supra*, the Supreme Court considered § 3205 of Pennsylvania's Abortion Control Act. The Supreme Court has previously upheld as constitutional state imposed restrictions that could extend a restriction on abortion over a longer period of time. *Ohio v. Akron Center for Reproductive Health*, 110 S.Ct. 2972, 2980-81 (1990)(parental notification procedures). In *Casey* the Court reconsidered its position in *Akron v. Akron Center for Reproductive Health Inc.*, 462 U.S. 416 (Akron I). The Court in *Casey* said:

> Our analysis of Pennsylvania's 24-hour waiting period between the provision of the information deemed necessary to informed consent and the performance of an abortion under the undue burden standard requires us to reconsider the premise behind the decision in *Akron I* invalidating a parallel requirement. In *Akron I* we said: "Nor are we convinced that the State's legitimate concern that the woman's decision be informed is reasonably served by requiring a 24-hour delay as a matter of course." 462 U.S., at 450, 103 S.ct., at 2503. We consider that conclusion to be wrong. The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision. The statute, as construed by the Court of Appeals, permits avoidance of the waiting period in

> the event of a medical emergency and the record evidence shows that in the vast majority of cases, a 24-hour delay does not create any appreciable health risk. In theory, at least, the waiting period is a reasonable measure to implement the State's interest in protecting the life of the unborn, a measure that does not amount to an undue burden.

It must be concluded under *Casey* that the 24 hour waiting period under Utah law is not per se an undue burden to a woman's right to an abortion.

The plaintiffs suggest that the waiting period will increase the medical risks (p.24 Memo. June 10, 1993). However, if there is a medical emergency the waiting period is no obstacle. The physician may exercise judgment as to whether the risk is sufficiently serious to constitute a medical emergency. Other medical effects are not shown to be significant or have not been clearly developed, especially in light of the fact that the operation of the waiting period is not as rigid or drastic as plaintiffs argue. The 24 hour waiting period, based on the evidence in this case, is common without the statute for many women as a matter of reasonable medical practice and the general process of the abortion decision. The abortion can be performed often as soon as a referring physician or the abortion physician can schedule the procedure. The waiting period does not require the formality plaintiffs suggest relative to providing the required statutory information to the woman. This will be detailed in the discussion of the information section.

In addition the evidence of Denise Defa states the average distance of travel is 40 to 50 miles for the persons for whom Defa provides services. This travel, which by Utah travel standards is hardly burdensome, and the 24 hour period will not substantially impede a woman's choice to

have an abortion under such circumstances. There is evidence most women have made up their mind before consulting a provider. If this is the case, the waiting period is unlikely to be an obstacle to choice as distinct from an inconvenience. There is also evidence that some abortion providers and some procedures require delays of 24 hours. In those circumstances there is no disharmony between the law and the medical practice.

The plaintiffs also suggest some categories of women will be seriously adversely effected. Battered women are referenced. However, the evidence show that intervention and counseling are the recommended practice in such cases. Further, counseling and assuring the decision is that of the women and not her tormentor or a self interested boyfriend can be served by the waiting period. This is within Dr. Kamindsky's submission from ACOG which notes that the woman "should be allowed sufficient time for reflection before she makes an informed decision." The same is true, given the acknowledged strong psychological problems, for women whose fetus may be deformed. Although the psychological effects of abortion are not as severe as some would contend, they do exist for some women and the waiting period and counseling can more fully address these concerns.

Also, the plaintiffs suggest anti-abortion protesters could have additional influence on a woman because of the waiting period. However, the evidence in this regard is no more than conclusory argument.[32] Protesters *per se* have

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[32]Some evidence suggests the delay may afford the opportunity to identify and stalk the woman. See discussion Seth F. Kreimer, "But Whoever Treasures Freedom..." The Right of Travel and Extraterritorial Abortions, 91 Mich. L. Rev. 907, 910 (1993). However, this is not a (continued...)

constitutional rights to state their position. See *Town of West Hartford v. Operation Rescue*, 991 F.2d 1039 (2d Cir.1993); *Cannon v. Sullivan*, 998 F.2d 867 (10th Cir.1993). Further, the protest is not encouraged or necessarily served by or related to the waiting period. If activities of antiabortion protesters go beyond legal bounds, police power intervention is available. This factor was identified in *Casey* and found not to be an undue burden. 112 S.Ct. at 2825. Indeed, the plaintiffs' claim as to this matter is problematical at best.

The plaintiffs suggest the cost of abortions will be increased. The record is devoid of any real economic analysis and again the plaintiffs' underlying assumptions are based on a construction of the application of the statute that is unjustifiably rigid. Of course, some increase in cost may occur. Two trips will not be necessary for most women. There is an adequate and substantial network of medical providers who can perform the initial advisory function at numerous places convenient to most women in Utah. There are approximately 20,000 people in Utah qualified to perform some of the functions under the statute. Further, at oral argument it was stated by defendants that Utah will recognize persons who are licensed by Utah who fit within § 305(1)(a) who conduct their medical services outside of Utah. There is absolutely no direct increased burden by virtue of the statute on out-of-state women over in-state women. If there is increased burden it is simply the fortuity of the decision to reside outside Utah, but to come to Utah for an abortion. This could apply to any interstate situation and if plaintiffs' argument were accepted as correct no abortion statute imposing any time period could withstand

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[32](...continued)
burden of the statute but a superseding burden from overzealous wrongdoers.

scrutiny. Such a restriction does not constitute a state imposed burden.[33] The state has not erected any actual burden or discriminated against out of state women in any way. See *Town of West Hartford v. Operation Rescue*, 991 F.2d 1039, 1047 (2d Cir.1993)(citing *Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1982)). See also 70 Wash. L.Q. 1205 (1992). The burdens of travel and added expense were rejected as an undue burden in *Casey*, 112 S.Ct. at 2825:

> These findings are troubling in some respects, but they do not demonstrate that the waiting period constitutes an undue burden. We do not doubt that, as the District Court held, the waiting period has the effect of increasing the cost and risk of delay of abortions," *id.*, at 1378, but the District Court did not conclude that the increased costs and potential delay amount to substantial obstacles. Rather, applying the trimester framework's strict prohibition of all regulation designed to promote the State's interest in potential life before viability, see *id.*, at 1374, the District Court concluded that the waiting period does not further the state "interest in maternal health" and "infringes the physician's discretion to exercise sound medical judgment." *Id.*, at 1378. Yet, as we have stated, under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest. And while the waiting period does limit a physician's discretion, that is not, standing alone, a reason to invalidate it. In

[33]In the context of interstate commerce analysis see Pike v. Bruce Church. Inc., 397 U.S. 137 (1970); see C. Steven Bradford, What Happens if Roe is Overruled? Extraterritorial Regulation of Abortion By the States, 35 Ariz. L. Rev. 87, 148-153 (1993).

> light of the construction given the statute's definition of medical emergency by the Court of Appeals, and the District Court's findings, we cannot say that the waiting period imposes a real health risk.

The plaintiffs' assumption of a two day waiting "requirement" is equally without merit. The delay is 24 hours and the plaintiffs' contention that younger women, ethnic minorities[34] and battered women will find this delay unreasonable is merely speculative, problematic, generalized, and mostly conclusory argument. In many instances telephone calls and medical examinations will be the only initial burden before an abortion if the woman wishes one. This will be all that will be involved as a matter of the application of the law. This is not an undue burden or substantial obstacle. Consequently, the allegations of undue burden and substantial obstacle are not sustained from the submissions.

In *Casey* the court spoke of undue burden as "shorthand

[34]The plaintiffs' argument sadly treats categories of minority women as though they were unable to make decisions for themselves. It implicitly characterizes ethnic status and culture in negative stereotypical terms. This is a sad overgeneralization and evidences a categorical classification not necessarily in keeping with actuality. The assumption is overly broad, if not itself a categorical stereotypical mischaracterization that argues for a finding of inherent inadequacy. The court has observed that too often counsel in constitutional issue cases will attempt to take advantage of concepts associated with discrimination analysis, which are not actually directly involved in the case, in order to obtain a discriminatory "effect." Often the only real effect is to argue for stereotypical characterizations of inferiority for minorities, which in the long run is more hurtful than useful to aiding the status of such individuals. The plaintiffs' argument in this case on the issue is unpersuasive and unproven.

for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 2820. The 24 hour waiting period, as such, does not impose that kind of obstacle. Plaintiffs suggest that categories of women who are victims of rape or incest, have fetal abnormalities or are depressed will face risks to their health. Absent a medical emergency, given the short time involved and the possibility that depending on the circumstances a woman may profit by some additional information or assurance, the plaintiffs' argument does not meet the standard of undue burden. As to the rape victim the record shows this class of women often decide to abort based on one additional factor than their victimization. In addition, the Utah law like the Pennsylvania statue referred to in *Casey*, 112 S.Ct. 2824 (Pa. Cons. Stat. 1992) provides that a physician is not guilty of violating the act if he can demonstrate "that he reasonably believed that furnishing the information would have a severely adverse affect on the physical or mental health of the patient." Utah Code Ann. § 76-7-305(4). The physician may exercise his or her medical judgment. *Casey*, 112 S.Ct. at 2825. The risk is problematical and not a categorical substantial obstacle. Also, it does not interfere with the abortion decision itself which is a critical factor under *Casey*.

Admittedly the 24 hour waiting period may not be useful to some women and for those women who have made up their minds to abort it will seem like an unnecessary delay. This is, however, insufficient to support a claim of unconstitutionality. The delay is inconvenient and arguably to some a nuisance, however, it is related to the state's interest in fostering informed decision making and preserving fetal life. Therefore, as noted by the joint opinion in *Casey* it is not an undue burden. See Donald P. Judges, *Hard Choices, Lost Voices* 237 (1992).

Informed Consent

The Utah law does not merely provide for a 24 hour waiting period. It provides in Utah Code Ann. § 76-7-305 that the categories of persons mentioned in subsection 305(1)(a)[35] must "orally inform the woman" of certain categories of information. This is to make the woman more informed about the decision to abort. It should be observed that the statute does not require face to face contact, only the *oral* submission of the information. Defendants' counsel at hearing admitted the law does not preclude telephone contact between the woman and the information provider. The information provider could give the information to the woman by telephone 24 hours before her appearance at the abortion clinic or hospital. Various applications of the advice requirement are possible under the statute. A woman could receive the advice from her own obstetrician, gynecologist, or other medical assistance provider who would than refer her for an abortion to an abortion clinic. The woman could also contact the abortion clinic for an appointment, receive the advice over the telephone from the abortion provider based on the information given by the woman which may have been obtained from her local doctor. Two trips to an abortion provider would not necessarily be required. Abortion providers could easily set up information services much like many businesses and government agencies to provide assistance to women considering an abortion. The woman could ask questions relevant to the abortion decision. The legislative intent would be fully satisfied as long as the woman is informed. This construction is in keeping with the judicial policy of avoiding constitutional burdens and giving the statute the

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[35]The Utah statute actually provides for a wider variety of persons who may provide informed consent information to the woman than did the Pennsylvania statute upheld in Casey.

construction that comports with constitutional standards. *Mountain States Tel. v. Garfield County*, 811 P.2d 184 (Utah 1991); *City of Logan v. Utah Power and Light*, 796 P.2d 697 (Utah 1990); *In re Boxer*, 636 P.2d 1085 (Utah 1981). This would also be in keeping with the requirement that statutory language be given its plain meaning. *Savage Industries v. Utah State Tax Com'n*, 811 P.2d 664 (Utah 1991); *State v. Jaimez*, 817 P.2d 822 (Utah App. 1991). There is no requirement under § 76-7-305(1)(a) for a face to face meeting. These various and flexible possibilities provide the woman considering an abortion greater opportunities in meeting the 24 hour waiting period requirement than would otherwise exist if a face to face meeting were required. As the Supreme Court observed in *Casey*:

> The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.
>
> *Casey*, 112 S.Ct. at 2820.

A construction of the statute in a fashion that reduces the potential burden is appropriate, especially where it comports with accepted axioms of statutory construction. Further, it is observed that the oral notification requirement is essentially the same as that in 18 Pa. Cons. Stat. Ann. § 3205(a) which received general approval in *Casey*.

The plaintiffs also contend that the advice provisions are superfluous because providers now give preliminary

advice and counseling to women considering an abortion. Indeed the evidence does show that the practice of some of the plaintiffs and ACOG and NAF members is to provide some of the information the Utah statute requires. Physicians (obstetricians, gynecologists) and members of the NAF have standards which generally require informed consent. However, this is not an argument against a state interest assuring that the information actually be provided under force of law. Some of the evidence submitted by the plaintiffs and defendants suggests there is not necessarily complete uniformity in the information provided and the advice does not always address the state's "interest in potential life." *Casey*, 112 S.Ct. at 2820. The practices and standards are not the same among providers.

The mere fact a statute conforms an industry practice to law does not mean it is burdensome or improper. It merely assures that proper practices are followed. It hardly seems arguable that the imposition of a regulation on an activity akin to what persons involved in the activity have imposed on themselves is an undue burden. (See brief of respondent in *Casey* in the United States Supreme Court (91-744, 91-902), reprinted in Leon Friedman, *Supreme Court Confronts Abortion* (1993)). As the Court said in *Casey*, "Regulations which do no more than create a structured mechanism by which the state...may express profound respect [for the abortion decision] are not a substantial obstacle to the women's right to choose." *Casey*, 112 S.Ct. at 2821. Therefore, the fact there may be some superfluity does not render the statute unconstitutional as an undue burden on the woman's choice for an abortion. The contrary position was urged in the Amicus Brief in *Casey* by the American College of Obstetricians and Gynecologists (ACOG) and other health care providers. Friedman, *supra* at 99-102. The required advice does not intrude on any right of the abortion provider.

Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position. The doctor-patient relation does not underlie or override the two more general rights under which the abortion right is justified: the right to make family decisions and the right to physical autonomy. On its own, the doctor-patient relation here is entitled to (105)the same solicitude it receives in other contexts. Thus, a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure.

All that is left of petitioner's argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, see *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. Cf. *Whalen v. Roe*, 429 U.S. 589, 603, 97 S.Ct. 869, 878, 51 L.Ed.2d 64 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

Casey, 112 S.Ct. at 2824.

The information requirements of § 76-7-305(1)(a)(i) requires advice on:

> the nature of the proposed procedure or treatment and of the risks and alternatives to that procedure or treatment that a reasonable patient would consider material to the decision of whether or not to undergo the abortion.

This is the kind of information appropriate to making an informed decision whether to undergo the abortion procedure. Subsection (ii) requires advice as to the probable gestational age of the unborn child at the time the abortion is to be performed. This is constitutionally relevant information, "[N]or can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive." *Casey*, 112 S.Ct. at 2823. There is nothing inappropriate about information as to gestational age. The evidence shows some women consider such information to be very important. Also, the abortion provider is in need of the information in making a medical assessment of the risks and proper abortion procedures.

Subsection (iii) requires information as to the medical risks associated with the woman carrying her child to term. The evidence indicates abortion is generally a safe procedure whereas carrying a child to term is, in a statistical context, more dangerous to the woman. The particular risk of carrying a child to full term is the kind of information normally associated with medical informed consent, e.c., Utah Code Ann. § 27A-3-611; 62A-6-105. See especially Utah Code Ann. § 78-14-5 (Utah informed consent law applicable to health care providers, Utah Medical Malpractice Act); *Ramon v. Farr*, 770 P.2d 131 (Utah 1989); *Barton v. Youngblood*, 711 P.2d 245 (Utah 1989); *Reiser v. Lohner*, 641 P.2d 93, 98 (Utah 1982); *Nixdorf v. Hicken*, 612 P.2d 348, 355 (Utah 1980); *Ficklin v. MacFarlane*, 550 P.2d 1295 (Utah 1976); *Lounsbury v. Capel*, 836 P.2d 188 (Utah App. 1992). The provisions of

subsection (iii) are proper. They are neutral and helpful to the woman's decision.

In addition, § 76-7-305(1)(b) provides that the information to be provided under § 305(1)(a) is also to be provided by the physician who is to perform the abortion unless an attending or referring physician provided the information before. This is obviously to insure that the person who provides the information is the most qualified. The Pennsylvania law approved in *Casey* did not contain a similar provision, but the Pennsylvania law did not allow the initial advice to be given other than by a physician. This requirement introduces some redundancy as to the procedure, but only where the original information provider is not a physician. Redundancy can be legitimately argued as adding weight to the preference for fetal life and raising a barrier to a woman's voluntary decision to have an abortion. However, the three categories of information are topically neutral. The redundancy assures the woman will receive complete and adequate information on her decision. In this case, it cannot be said the additional advice, when the original advisor was not a physician, is so weighted or improper as to be a substantial obstacle to a voluntary decision by a woman to undergo an abortion. Some of the submissions received from physicians said they would give advice a second time even on a referral from another physician. It is no more than assuring that sound medical advice has been provided. It does not constitute an undue burden to a woman's choice for an abortion The performing physician may provide the woman considering an abortion with other information relevant to that choice. The provider is not limited to giving only the advice the state requires. The provider may expand on the context and circumstance of the advice if he or she believes it proper. Supplementary information beyond what the-statute requires may be given by the provider.

Utah Code Ann. § 76-7-305(1)(c) requires that 24 hours prior to an abortion the woman considering an abortion is to be given other advice as well. This may be provided by the same persons mentioned above and in addition, in this category, other persons delegated by a physician such as a clinical laboratory technologist, psychologist, marriage counselor, social worker and others can provide the advice. However, for some reason physician's assistants are excluded which effectively requires such a person to work in conjunction with someone else[36] and all advice from providers must be based on a delegation from a physician. This has not been shown to be difficult. The information must be orally provided that:

> (i) the Department of Health publishes printed material that describes the unborn child and lists agencies that offer alternatives to abortion, and that she has a right to review that printed material, which will be provided to her free of charge if she chooses to review it.
>
> § 76-7-305(1)(c)(i).

This feature was also in the Pennsylvania statute in *Casey*. It seems reasonable to provide a woman notice of the availability of such materials if she wishes to examine them. Of course, the woman need not accept the offer and is free to refuse to take advantage of the opportunity to examine the offered materials. The provision only extends an option if the woman wishes to avail herself of it.

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[36]The minor drafting errors and miscues in S.B. 60 suggest the legislation was hastily drafted to meet the Pennsylvania statute and take advantage of Casey. The result is a somewhat clumsy and disharmonious statute in places, although not necessarily unconstitutional.

§ 76-7-305(1)(c)(ii) requires advice that medical assistance benefits "*may* be available for prenatal care, childbirth, and neonatal care" and that the indicated information can be obtained in printed materials from the Utah Department of Health. It does not require the adviser to expound on the available assistance or its limitation, although if the adviser can supplement the information and make any clarification it will be useful. It does not obligate the woman to read or investigate, it merely affords her notice that such information is available.

§ 76-7-305(1)(c)(iii) requires advice to the woman that the father of the child is legally required to assist in the support of the child, even if the father has offered to pay for the abortion. The advice needn't be given in the case of rape. The advice is a correct statement of Utah law, although in circumstances where a father may be dead[37] or disabled, it may be difficult to collect any financial support and this may be true in other cases. Again as with subsection (ii), the advice in subsection (iii) may not have utility for all women, but it is a truthful statement in general and will be true in many cases. It is not itself misleading, though not gully complete, and may alert some women to a revenue and support source they had not otherwise considered. The giving of the advice and its receipt are not obstacles to the abortion choice, and may in some instances be the kind of information useful to a woman in making such a decision. This fulfills a legitimate state interest. The overall advice requirements are not unduly burdensome on the woman's choice to have an abortions either as a direct burden on the woman or the additional burden that the plaintiff providers may incur in having to give the advice

[37]Legally the estate of a deceased father would be responsible for support of the child and worker's compensation or other benefits could be available as well.

which will to some extent increase the cost of an abortion.[38] Therefore, under *Casey* S.B. 60 does not offend the Constitution.[39]

Some of the provisions of the Pennsylvania law which are also contained in the Utah law were found by the District Court in *Casey* to be burdensome, however, the Supreme Court did not accept the conclusion that the burden was equal to the "undue burden" requirement necessary to invalidate the legislation. Donald P. Judges, *Hard Choices, Lost Voices, supra* at 237-238.

S.B. 60 also imposes one other advice requirement. § 767305(1)(d) requires that a "copy of the printed materials has been provided to the pregnant woman if she chooses to review those materials."[40] This, of course, is a matter of concern to the women's clinics. The woman considering an abortion need not change her mind or delay her decision. She may ignore the materials if she chooses. Merely making the written materials available at the option of the woman is no burden. It provides a mechanism for the woman to be more fully informed. A similar provision is found in the Pennsylvania statute which was held to be inoffensive in *Casey*. 18 Pa Cons. Stat. Ann. § 3205(a)(3).

[38]As noted before, the record contains no acceptable evidence of the actual cost increase that S.B. 60 may cause.

[39]The obligation to provide the additional information in no way offends the First Amendment rights of plaintiff providers. See Casey, 112 S.Ct. at 2824.

[40]Specific provisions of Utah Code Ann. § 76-7-305.5 set forth the information to be presented in the written materials. The content of these materials will be considered herein.

It should be remembered the advice requirement may be excused by medical emergency, that the physician has an affirmative defense in failing to give the required advice if the physician reasonably believed that furnishing the information would result in a severe adverse affect to the physical or mental health of the woman.

Of course if a physician acts intentionally or with other criminal mens rea to violate the Utah statute, such person may be held criminally liable. Physicians and other health care providers are not immune from the consequences of the criminal law simply because they are engaged in the practice of medicine which involves judgement.[41]

The Utah statute further requires the Utah Department of Health to make printed materials available to a woman at no cost to her. Utah Code Ann § 76-7-305(1)(c)(i)(d). The materials are described in Utah Code Ann. § 76-7-305.5. The purpose of such material is to "insure that the consent to an abortion is truly informed consent." § 76-7-305.5(1). There is no obligation on the part of the woman to examine

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[41]See State v. Warden, 813 P.2d 1146 (Utah 1991)(physician's conviction for negligent homicide in conjunction with infant birth upheld); State v. Tritt, 23 Utah 2d 365, 463 P.2d 806 (1970)(physician convicted of contributing to the delinquency of a minor in recklessly prescribing amphetamines). It is within the legislative prerogative to enact a specific provision to cover the conduct of physicians if the legislature believes this will enhance the regulatory interests of the state. The general criminal law may be adequate for some instances, but special provisions may be warranted in others. See Title 26 Chapter 20 Sections 7-9 (Utah Medicare False Claim Act). Utah has historically treated abortion as an area of the criminal law warranting specific attention in the criminal code. See Rev. Stat. Utah 1898 § 4226. As to the Utah territory, see Compiled Laws of Utah 1876 § 142. That has been the approach of most American jurisdictions. See Brief of 250 American Historians As Amicus Curiae, in Casey, Friedman, supra at 136-160.

the materials and all the adviser is required to do is inform the woman of their availability and make them available if the woman wishes. § 767-305.5(3). The subsection does not apply if the attending or referring physician believes that providing the materials would result in a severely adverse effect on the woman's mental and physical health. Utah Code Ann. § 76-7-305.5(4). The provision allows room for the exercise of professional medical judgment. It is not inappropriate to make relevant information available to a woman considering an abortion:

We also see no reason why the state may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus even when those consequences have no direct relation to her health. *Casey*, 112 S.Ct. at 2823.

What is important is that the material be truthful. "If the information the state requires to be made available to the woman is truthful and not misleading, the requirement may be permissible." *Id.* at 2823. In this case, there was evidence presented that some of the information that was available from the Utah Board of Health was misleading, misstated or erroneous. The evidence is in the plaintiffs' submissions in the April 1993 materials. However, it appears the Board of Health has been going through an evolutionary process to obtain accurate and acceptable materials. This is the conclusion from Ron L. Betit's submission and Dr. Steven L. Clark's opinion. In the last submissions of the parties it appears that some of the erroneous and objectionable material has been eliminated. At this point the evidence is unclear and will not support a finding that the information to be made available by the UDH is untruthful or misleading. The record is not sufficiently developed on this issue to make a reasonable conclusion and the burden of proof is on the plaintiffs. This

does not mean that the materials made available could not be challenged on a proper submission with a complaint drawn specifically to that purpose. Such a determination must await a different challenge and better evidence than that now before the court.

The materials must provide information on organizations that will provide assistance to a woman through pregnancy and of the available public and private adoption services. This is useful, relevant, and is information of potential interest to a woman considering abortion or birth.

The required information includes the probable anatomical and physiological characteristics of a fetus through the gestational cycle. The information is to include pictures that are "realistic and appropriate for the women's stage of pregnancy." § 76-7-305.5(1)(b). Objective descriptions of abortion procedures are to be made available along-with information on the possibility of the unborn child's survival at two-week gestational increments and information concerning the availability of medical assistance benefits for prenatal care, childbirth and neonatal care. This information is not per se objectionable. *Casey*, 112 S.Ct. at 2823. The appropriateness of this information has been previously discussed. The material must also include information that it is unlawful to coerce a woman to undergo an abortion.[42] Further, the advice in the written materials must be available for informed consent. The woman need not read or even be exposed to the material unless she desires it and if she does wish to see the

[42]The evidence of coercion is anecdotal at best, however, there is nothing inappropriate about advising the woman that any coercion is improper.

materials there is nothing in the law that requires her to review all the materials. The woman could change her mind at any time. The statutory provision as to the materials which a woman may examine, which are to be provided by the Utah Board of Health, is not itself a matter that would unduly burden a woman's decision. The printed information provisions closely parallel § 3208 of the Pennsylvania Statute, op. cit. These provisions do not interfere with the woman's right to chose an abortion since she is in no way obligated to accept the offer to review the materials. In *Casey*, the Court observed:

Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause. *Casey*, 112 S.ct. at 2819.

Utah Code Ann. § 76-7-305(1)(e) requires the pregnant woman to certify in writing before the abortion, that the information required in subsections (a),(b),(c), and (d) was provided to her. This is virtually identical with 18 Pa. Cons. Stat. Ann. § 3205(a)(4). This is merely evidentiary assurance the statutory requirements are met and does not itself, or in conjunction with other provisions of the law, unduly burden the woman's choice.

State Interest

The plaintiffs have made a suggestion the legislation does not serve a legitimate state purpose. The argument is clearly without any merit. It is legitimate, as the court in *Casey* made *very* clear, that a state have an interest in fetal life. In *Casey* the Court said:

> Some guiding principles should emerge. What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. See *infra*, at _____ (addressing Pennsylvania's parental consent requirement). Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.
>
> 112 S.Ct. at 2821.

As long as the state's regulation does not constitute an undue burden it may seek to influence a woman in procreation. The materials and information need not be neutral. *Akron I, supra* and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) to the contrary have been overruled by *Casey*. The materials may express the state's interest in the fetus and in "potential life." *Casey* 112 S.Ct. at 2820. The Court in *Casey* also said:

> As we have made clear, we depart from the holdings of *Akron I* and *Thornburgh* to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion. In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to insure an informed choice, one which might cause the woman to choose childbirth over abortion. This requirement cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden.
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> *Casey* 112 S.Ct. at 2824.

Therefore, plaintiffs' argument that the Utah Abortion statute is not reasonably related to the state's interests is without merit. The state's interest need not be unbiased. The state may promote its interest in fetal life. That is not unconstitutional.

In *Barnes v. Moore*, 970 F.2d 12 (5th Cir.1992) *cert. denied*, 113 S.Ct. 656 (1992). The court upheld the Mississippi abortion statute's informed consent law. The Mississippi law did not parallel as closely the Pennsylvania statute as does the Utah statute. The Utah law has provisions which are arguably more flexible and less debatable than the Mississippi statute when compared to what was sanctioned in *Casey*. In spite of some variations from the Pennsylvania law, the court in *Barnes* found there was no undue burden on a woman's choice to have an

abortion and directed dismissal of the suit. Based on this conclusion, the Utah statute cannot be said to be unconstitutional.

Finally, it should be noted that where the state interest is served, the legislative scheme to provide informed consent is essentially irrelevant to the constitutional issue unless the scheme imposes an undue burden on the woman's right to abortion. The Utah law does not violate that standard.

Conclusion

Upon careful analysis of the plaintiffs' challenge to the provision of the Utah Abortion Act Revision, S.B. 60, it must be concluded that the 24 hour waiting period for an elective abortion is not unconstitutional because it does not impose an undue burden on a woman's access to an abortion or freedom to choose to abort or give birth. The conclusion is dictated by the decision in *Planned Parenthood v. Casey, supra.*

The provision of the Utah law relating to exceptions to the informed consent requirement, and allied sections, that exist for medical emergencies does not violate due process. Although, the law could have been better drafted and might be clarified to give more precise direction, S.B. 60 is not unconstitutionally vague.

The information provisions of the Utah law are not absolutely neutral and favor promotion of fetal and human life.

However, they do not impose an undue burden on a woman's right to an abortion under the due process clause. The Utah law is within the *Casey* standard.

The plaintiffs' request for further injunctive relief should be denied, the present injunction dissolved, and the case dismissed.

Copies of the foregoing report and recommendation are being mailed to the parties. They are hereby notified of their right to file objections hereto within 10 days from the receipt hereof.

Dated this 10th day of November, 1993.

/s/
Ronald N. Boyce
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

UTAH WOMEN'S CLINIC, INC., EDWARD R. WATSON, M.D., MADHURI SHAH, M.D., ALISSA PORTER, WENDY EDWARDS, WASATCH WOMEN'S CENTER, P.C., WILLIAM R. ADAMS, M.D., DENISE DEFA, and SARAH ROE,

Plaintiffs,

OPINION AND ORDER

vs.

MICHAEL LEAVITT, in his individual and official capacity as Governor of the State of Utah, and JAN GRAHAM, in her individual and official capacity as Attorney General of the State of Utah,

Defendants.

Case No. 93-C-407B

On January 28, 1994, a hearing was held before the Honorable Dee Benson. The court heard oral argument on plaintiffs' Objections to the Report and Recommendation of the Magistrate Judge. The plaintiffs were represented by Eve Gartner and Lenora Lapidus, of the Center for Reproductive Law & Policy, New York City, New York, and Martin W.

Custen, of Marquardt, Hasenyager & Custen, Ogden, Utah. The defendants were represented by J. Mark Ward, of the office of the Utah Attorney General. The court, having reviewed the memoranda submitted by the parties, having heard oral argument from counsel, being fully apprised, and for good cause appearing, hereby enters the following Opinion and Order:

INTRODUCTION

A brief history of recent legal developments on the subject of abortion follows:

(1) In *Roe v. Wade*, 410 U.S. 113 (1973), the United States Supreme Court held that women in the United States have a constitutional right to have an abortion, with certain specified conditions. This decision had the immediate effect of striking down many state laws against abortion, including Utah's. *See Doe v. Rampton*, 366 F. Supp. 189 (D. Utah 1973).

(2) In the 21 years since *Roe v. Wade*, the political battle over abortion has intensified, no doubt affecting decisions of voters, legislators and, to some extent, presidential appointments to the United States Supreme Court. There are unquestionably large groups of Americans on both sides of the abortion debate, at one extreme urging the reversal of *Roe* and at the other extreme seeking to preserve and even strengthen the case as a matter of constitutional right.

(3) In the past 21 years, states have on occasion passed statutes attempting to put certain restrictions and controls on abortion. Many of these laws have been challenged in federal court as unconstitutional. Because of Roe, most of the state legislative attempts to place restrictions on abortion, no matter how minor, were found by the courts to be unconstitutional. *See, e.g., Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976); *Colautti v. Franklin*, 439 U.S. 379 (1979); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986). In cases subsequent to *Roe*, the United States Supreme Court required "any

regulation touching upon the abortion decision" to "survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2817 (1992).

(4) In 1989, the United States Supreme Court signaled a change in the test for state law restrictions on abortion in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). There, in assessing the constitutionality of a Missouri abortion statute, the Supreme Court applied a more deferential standard of review. In upholding the constitutionality of the Missouri statute, the Court noted: "There is no doubt that our holding today will allow some governmental regulation of abortion that would have been prohibited under the language of [earlier Supreme Court cases]." *Id.* at 520-21.

(5) The Supreme Court's opinion in *Webster* created a great deal of interest in the legal and political battle over abortion. Many commentators predicted that *Webster* foreshadowed the reversal of *Roe v. Wade*. *See, e.g., Thornburgh Predicts Roe v. Wade Reversal*, N.Y. Times, July 10, 1989, at B8; Bruce Fein, *The Court is Ready to Overturn 'Roe'*, N.Y. Times, July 5, 1989, at A21; Al Kamen, *Supreme Court Restricts Right to Abortion, Giving States Wide Latitude for Regulation*, Wash. Post, July 4, 1989, at Al. *Webster* appeared to open up new opportunities for states to exert an interest in protecting unborn life by imposing additional restrictions on abortion. In response to this opinion, several states passed new legislation further protecting the life of the unborn fetus, and restricting the woman's right to an abortion. *See, e.g.*, 1989 Pa. Laws 592, No. 64; 1990 Guam Pub. Law 20134; 1991 La. Acts 26.

(6) In 1990, the Utah legislature adopted a resolution

stating that the policy of the legislature was to favor childbirth over abortion and to restrict abortion to the extent the Constitution would permit. HJR 39, Abortion Limitation Resolution. The following year, in 1991, the legislature enacted Senate Bill 23, An Act Relating to Abortion; Prohibiting Abortion Except Under Special Circumstances (the "1991 law"). This law essentially banned abortions in Utah unless one of several exceptions was met.[1]

(7) The 1991 Utah law was clearly in conflict with *Roe v. Wade*. It was passed with the hope that *Roe* would be overturned. The Governor publicly stated that the law would not be enforced until its constitutionality had been determined by the courts. The state did not hide the fact that the law was passed in anticipation of the reversal of *Roe v. Wade*.

(8) That did not occur. In 1992, the United States Supreme Court decided *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992), which reaffirmed *Roe v. Wade*.[2] Consequently, as expected, Utah's

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[1]The law allowed for abortions where the pregnancy was the result of rape or incest, and where the abortion was necessary to save the pregnant woman's life, to prevent grave damage to her medical health, or to prevent the birth of a child who would be born with grave defects. The rape and incest exceptions did not apply after the pregnancy had reached 21 weeks gestational age. See Utah Code Ann. § 76-7-302(2).

The statute also included a requirement of spousal notification, and set up a statutory presumption of viability at 21 weeks gestational age. Id.

[2]The Supreme Court explained that "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child," Casey, 112 S. Ct. at 2804, but that "[be]fore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a (continued...)

1991 law was declared unconstitutional, with no objection to that general finding-by the state of Utah. *See Jane L. v. Bangerter*, 809 F. Supp. 865, 870 (D. Utah 1992) ("*Jane L. III*"). There was, however, extended litigation in this federal court (Judge J. Thomas Greene presiding) over numerous challenges to the 1991 law.[3]

(9) In *Casey*, the United States Supreme Court reviewed the constitutionality of a Pennsylvania abortion law. The

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[2](...continued)
substantial obstacle to the woman's effective right to elect the procedure." Id.

[3]Only a portion of the 1991 law was found to be unconstitutional. The court struck down the law's restriction on pre-viability abortions and its spousal notification requirement. On the other hand, the court upheld the statute's presumption of viability at 21 weeks and its restrictions on abortion after that time. Jane L. III, 809 F. Supp. at 871-74. The court also upheld the statute's medical health provisions, id. at 874-76, 877-80, and its fetal experimentation provision. Jane L. v. Bangerter, 794 F. Supp. 1537, 1549-51 (D. Utah 1992) ("Jane L. II").

The majority of plaintiffs' challenges were dismissed by the court. Plaintiffs had alleged that the 1991 law violated the United States Constitution under the following theories: (a) Vagueness, (b) Equal protection, (c) Establishment of Religion (d) Free Exercise (e) Involuntary Servitude, and (f) Free Speech. Each of these theories was also raised under the Utah constitution. The court found no merit to any of these challenges and dismissed them all. See Jane L. v. Bangerter, 794 F. Supp. 1528 (D. Utah 1992) ("Jane L. I"); and Jane L. II, 794 F. Supp. at 1537.

The court later determined that several of these claims were frivolous, and awarded attorney's fees to defendants on those grounds. See Jane L. v. Bangerter, 828 F. Supp. 1544 (D. Utah 1993) ("Jane L. IV"). Specifically, the court made findings that plaintiffs' claims were "frivolous and groundless," id. at 1554-55 (involuntary servitude claim), "without foundations id. at 1555 (equal protection claim), "frivolous, and without legal or factual foundation," id. at 1556 (establishment clause claim), and "brought in bad faith," id. (state constitutional claims).

principal elements of the Pennsylvania law were: 1) a 24-hour waiting period, 2) informed consent based on the mandatory distribution of certain information to every woman seeking an abortion in Pennsylvania, and 3) a requirement that the spouse of the pregnant woman be notified of the abortion. The law also included medical emergency exceptions from these requirements.

(10) The Supreme Court in *Casey* upheld the essence of *Roe*, but it modified the standard for evaluating state restrictions on abortion. The Court determined that in asserting an interest in protecting fetal life, a state may place some restrictions on previability abortions, so long as those restrictions do not impose an "undue burden" on the woman's right to an abortion. The Court explained that a state regulation imposes an undue burden if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 112 S. Ct. at 2820.

(11) In applying this standard to the Pennsylvania law, the United States Supreme Court determined that the 24-hour waiting period, the informed consent requirement, and the medical emergency definitions did not unduly burden the right to an abortion and were therefore constitutional.[4] *Casey*, 112 S. Ct. at 2822-26.

(12) In 1993, the Utah legislature tried again. The Utah Abortion Act Revision, Senate Bill 60 ("S.B. 60') (codified at Utah Code Ann. § 76-7-305), was enacted. Rather than anticipating what the United States Supreme Court might do in the future, as had been the case in enacting the 1991 law,

[4]The Court found, on the other hand, that the spousal notification requirement placed a substantial obstacle on the abortion right and was therefore unconstitutional. Casey, 112 S. Ct. at 2826-31.

the legislature closely tailored S.B. 60 to those portions of the Pennsylvania law which had already passed constitutional muster in *Casey*. S.B. 60 provides for informed consent by requiring that certain information be given to the pregnant woman at least 24 hours prior to the performance of the abortion. The law allows for exceptions to this requirement in the event of a medical emergency.

(13) The Utah and Pennsylvania laws are nearly identical. *Compare* Utah Code Ann. § 76-7-305 with 18 Pa. Cons. Stat. Ann § 3205 (1990). In those instances where the laws differ, the Utah law is less restrictive, and places less of a burden on a woman's right to an abortion.[5]

(14) Notwithstanding the fact that S.B. 60 was modeled after the constitutionally sufficient Pennsylvania law, plaintiffs initiated this litigation by filing a 106 page Complaint, which could more properly be described as a press release, challenging the constitutionality of the new Utah law. Plaintiffs' counsel boldly asserted that in this case *Planned Parenthood v. Casey* is not controlling, and that they can prove it.

(15) It is and they haven't.

DISCUSSION

[5]For example, the laws differ as to the question of who must provide the initial medical information 24 hours prior to the abortion. The Pennsylvania law requires that a physician shall provide such information. See 18 Pa. Cons. Stat. Ann. § 3205(a)(1) (1990). Under the Utah law, the initial information may be given by various non-physician medical practitioners, go long as the attending physician gives the information prior to performing the abortion. See Utah Code Ann. § 76-7-305(1).

Procedural Background

S.B. 60 was scheduled to take effect on May 3, 1993. On April 23, 1993, however, plaintiffs initiated this litigation, seeking preliminary and permanent injunctive relief to stay enforcement of the law. This court granted a 10-day Temporary Restraining Order staying enforcement of the Act. After the stay was extended for an additional 10 days, the parties entered into a stipulation to continue the stay pending the court's resolution of plaintiffs motion for injunctive relief. (dkt. 37)

The case was referred to the Magistrate Judge under 28 U.S.C. § 636(b)(1)(B). Pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, and as agreed by the parties, the trial on the merits of this case was advanced and consolidated with the hearing on the motion for preliminary injunction.

The consolidated hearing for injunctive relief was held before the Magistrate Judge on June 21, 1993. Pursuant to an agreement of the parties,.the following three issues were presented to the court at the hearing:

1. The constitutionality of the Utah 24-hour waiting period for an elective abortion.[6]

2. The constitutionality of the Utah medical emergency exceptions to the waiting period for an elective abortion.

3. The constitutionality of the Utah abortion

[6]The term "elective abortion" refers to an abortion based on the choice of a woman as opposed to a spontaneous abortion. See Report & Recommendation, at 5 n.2.

statute's requirement that certain information be provided to every woman who seeks an elective abortion.

(dkt. 36)

On November 10, 1993, the Magistrate Judge issued his Report and Recommendation. The Magistrate Judge determined that the 24 hour waiting period and the information requirement do not impose an undue burden on the right to an abortion. He further determined that the medical emergency provisions provide a constitutionally workable health exception and are not unconstitutionally vague. Finding that S.B. 60 is constitutionally proper, the Magistrate Judge therefore recommends that plaintiffs' request for injunctive relief be denied, that the current stay be lifted, and that plaintiffs case be dismissed. *See Report & Recommendation*, at 121.

PLAINTIFFS' OBJECTIONS TO THE REPORT AND RECOMMENDATION

Ironically, the bulk of plaintiffs' "objection" memorandum is spent urging this court to adopt the analysis of the Magistrate Judge. Plaintiffs ask the court to accept and adopt the Report and Recommendation's findings as to the first two issues -- the 24 hour waiting period and informed consent requirement. Plaintiffs object to only one of the issues determined by the Magistrate Judge -- the medical emergency exceptions.

I. The Waiting Period/Informed Consent Requirements

Plaintiffs submit that they do not object to the Report and Recommendation's conclusions as to these issues so long as the court does not reject or modify the Magistrate

Judge's interpretation and analysis. Specifically, plaintiffs condition their acceptance of the Report and Recommendation on the court's adoption of: "(1) the R&R's construction of the statutory term 'orally inform'; [and] (2) the R&R's conclusion that a physician could only be subjected to prosecution if he or she acted with bad faith with the intent to violate the statute . . . . " *Plaintiffs' Objections to the Magistrate Judge's Report and Recommendation*, at 6 ("*Plaintiffs' Objections*").[7]

Plaintiffs' concerns and positions on these issues are

[7]Plaintiffs also condition their acceptance of the Report and Recommendation on the court's accepting their position on the issue of civil liability of physicians under the Act. Plaintiffs submit that this court "must . . . clarify that compliance with S.B. 60 would insulate physicians in any civil malpractice action premised on a failure to obtain informed consent." *Plaintiffs' Objections*, at 6-7. To this end, plaintiffs have submitted additional evidence as to potential civil liability of abortion practitioners.

Plaintiffs' demand for clarification on this matter is not proper. It is completely irrelevant to the issues at hand. The constitutionality of S.B. 60's informed consent requirement is not dependent upon the issue of civil liability for abortion practitioners. It is illogical and improper to condition the lack of an objection to one issue on the court's willingness to provide a favorable interpretation of a different, unrelated issue.

Furthermore, the issue of civil liability for abortion practitioners who comply with the act is not a part of this lawsuit. It was not raised in the plaintiffs' Complaint. It was not one of the issues presented to the court at the consolidated hearing. It was not discussed in the Report and Recommendation of the Magistrate Judge.

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, plaintiffs must raise specific objections to the portions of the Report and Recommendation with which they disagree. They may not raise new issues which were not raised before the Magistrate Judge. Moreover, there are serious questions as to whether plaintiffs have standing to bring such a claim.

Accordingly, the court declines to clarify any aspect of physician civil liability under the abortion law.

procedurally and legally improper. They do not constitute allowable objections to the Report and Recommendation. As will be explained in more detail below, plaintiffs' so-called conditional non-objections are irrelevant to the constitutional issues presented by their Complaint, and they are therefore summarily rejected by the court. On the issues related to the 24 hour waiting period and informed consent requirements, the court accepts the Recommendation of the Magistrate Judge.

A. Telephonic Communication Not Required Under Casey.

In evaluating S.B. 60, the Magistrate Judge interpreted the term "orally inform" to allow for telephonic communication, rather than requiring a face-to-face meeting. Plaintiffs submit that they do not object to the Report and Recommendation if this court will adopt that interpretation. Such an interpretation, however, is not necessary to uphold the constitutionality of the law under *Casey*.

The district court in *Casey* made a specific finding, on the record, that the Pennsylvania law would require a minimum of two visits for every woman. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 744 F. Supp. 1323, 1351 (E.D. Pa. 1990). ("*Casey I*"). Nevertheless, the United States Supreme Court, based on that record, upheld the Pennsylvania law as not unduly burdensome. *Casey*, 112 S. Ct. at 2825-26.

Because the two visit requirement is constitutional in Pennsylvania, it must also be constitutional in Utah -- especially in the context of a facial challenge. Accordingly, even if S.B. 60 were to specifically mandate two visits to the abortion clinic for every woman, it could not be found facially unconstitutional on those grounds. An informed consent requirement which requires two visits is simply not

a substantial obstacle, as stated by the Supreme Court in *Casey*.

Plaintiffs' efforts to require more of the Utah statute in order for the statute to survive a constitutional challenge are clearly without merit and constitute an attempt to improperly use the court's resources to obtain an advisory opinion, which is certainly not a proper purpose under a facial challenge.

B. Facial Challenges in the Abortion Context

Plaintiffs' approach suggests that once it appeared from the Magistrate Judge's virtually unassailable Report and Recommendation that no finding of unconstitutionality was possible, the plaintiffs' tactic became one of obtaining a favorable advisory opinion as to how S.B. 60 should be interpreted and enforced, rather than a good faith facial challenge to its constitutionality.

Plaintiffs' motive in that respect is shown by statements made in their memorandum. First, plaintiffs state that, "[h]ad the Attorney General clarified [the issue of face-to-face communication], this entire lawsuit might have been avoided." *Plaintiffs' Objections*, at 4 n.3. Second, although the Magistrate Judge recommended that plaintiffs' facial challenge be denied, plaintiffs readily conceded that the Magistrate Judge was correct and did not object to his recommendation so long as the court adopts. certain interpretations in the Report.

Plaintiffs' approach reveals a misuse or misunderstanding of the facial challenge. Facial challenges carry a high standard of proof. Traditionally, facial challenges are governed by *United States v. Salerno*, 481 U.S. 739, 745 (1987). There, the Court explained:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no met of circumstances exists under which the Act would be valid.

A facial challenge must challenge the language rather than the application and enforcement of a statute. A good faith facial challenge may not be brought unless the plaintiff believes that the statute is invalid as written, and that there is no way in which the statute can be applied in a constitutional manner.

When interpreting statutory provisions in the context of a facial challenge, "courts should construe a statute to avoid a danger of unconstitutionality." *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2980 (1990) (quoting *Planned Parenthood Ass'n of Kansas City. Mo., Inc. v. Ashcroft*, 462 U.S. 476, 493 (1983)). Courts should not strike down a statute "based upon a worst-case scenario that may never occur." *Id.* at 2981. Courts should not engage in speculation as to how a statute might be enforced. When a statute is capable of a plausible interpretation which would render it constitutional, that interpretation must be accepted and the statute must survive the facial challenge, even if there are other, equally plausible interpretations which would render the statute unconstitutional.

In *Casey*, the Supreme Court seems to have altered the traditional standard for facial challenges in the abortion context.[8] Instead of determining whether the law cannot be

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[8]In Casey, the Court struck down the Pennsylvania spousal notice provision, not because it was unconstitutional in all circumstances, but rather because it was unconstitutional "in a large fraction of the cases in

(continued...)

applied constitutionally in *any* circumstance, the court must look to the relevant class of people likely to be affected by the law and determine whether the law cannot be applied

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[8](...continued)
which [it] is relevant." Casey, at 2830.

This language, by itself, leaves little guidance as to whether, and how, the Salerno facial challenge analysis has been altered. The issue remains a matter of dispute among the members of the Supreme Court. In 1992, Justices Scalia, Rehnquist, and White, in dissenting from a refusal to grant certiorari, stated:

> Our traditional rule has been, however, that a facial challenge must be rejected unless there exists no set of circumstances in which the statute can constitutionally be applied.
>
> The Court did not purport to change this well-established rule last Term in [Casey].

Ada v. Guam Society of Obstetricians & Gynecologists, 113 S. Ct. 633 (1992). Later, Justices O'Connor and Souter, in concurring with a denial of certiorari, explained:

> In striking down Pennsylvania's spousal-notice provision, we did not require petitioners to show that the provision would be invalid in all circumstances. Rather, we made clear that a law restricting abortions constitutes an undue burden, and hence is invalid, if, "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." And the joint opinion specifically examined the record developed in the district court in determining that Pennsylvania's informed-consent provision did not create an undue burden.

Fargo Women's Health Organization v. Schafer, 113 S. Ct. 1668 (1993) (citation omitted). For purposes of this memorandum, the court will follow the analysis of the Magistrate Judge, Report & Recommendation, at 90-92, in applying the interpretation of Justice O'Connor.

constitutionally in a large fraction of those cases.[9]

This new standard changes the focus as to whom the law will affect. It does not, however, change the standard for statutory interpretation under a facial challenge. Courts must still interpret the statute in a manner which will favor its constitutionality, if the statute is capable of such an interpretation.

Accordingly, to bring a facial challenge in good faith, one must reasonably believe that the statute is incapable of being applied constitutionally in a large fraction of the cases in which it is relevant.

In the present case, it is clear that plaintiffs could not

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[9]At oral argument, plaintiffs tried to contend that the relevant class of women should be construed narrowly. They would have the court limit the class to those women who are particularly burdened by the law.

Such a construction, however, turns the facial challenge analysis on its head. It is no test at all. If the class is drawn too narrowly, a finding of undue burden in one abberational circumstance would be enough to strike down the law. Plaintiffs would, in effect, have the court draw the class to encompass only those women for whom the law would be an undue burden. This would render the facial challenge meaningless and nonsensical.

In the instant case, plaintiffs' challenge was certified as a class action. Pursuant to stipulation of the parties, that class was defined as:

> All women who currently, or will in the future, seek an abortion in the State of Utah, and all women who currently, or who will in the future, seek or obtain information regarding their options with respect to pregnancy, when such information is required to be given by Utah Code Ann. §§ 76-7-305 and 76-7-305.5, as amended by Utah Senate Bill 60 of 1993.

(dkt. 49). This is clearly the class to which the law is relevant.

have reasonably had such a belief. Plaintiffs now readily concede that if S.B. 60 is interpreted so as to allow for telephonic communication, it does not impose an undue burden on the women for whom the law is relevant. Notwithstanding plaintiffs' knowledge that S.B. 60 was capable of constitutional interpretation and application in relevant cases, plaintiffs initiated this facial challenge -- alleging that the statute was incapable of such application. This suggests plaintiffs' bad faith.

Plaintiffs submit that this lawsuit was initiated based upon the fear that S.B. 60 would be interpreted so as to require two visits to the clinic by all women. Because the Utah Attorney General refused to answer their inquiries on this point, plaintiffs argue, they were required to make an "assumption" that S.B. 60 would be enforced in that manner. Plaintiffs claim to have filed this lawsuit based upon that assumption.

This explanation does not save plaintiffs from a finding of bad faith. Rather, it confirms it.

An assumption of possible unconstitutional enforcement does not justify bringing a facial challenge. A worst-case interpretation may not be used to strike down a statute which has another plausible constitutional interpretation. Furthermore, as discussed earlier in this opinion, the plaintiffs could not in any event have argued in good faith that the Utah law had to allow for telephone communication in order to be constitutional in light of *Casey*'s constitutional validation of two face-to-face visits.

When a plaintiff has a legitimate fear that a facially valid statute will be enforced in an unconstitutional manners the proper remedy is to see if the statute is in fact enforced in an invalid manner. If it is, the plaintiff may properly raise

an "as-applied" challenge to the statute. It is not proper, however, to file a bad faith and groundless facial challenge, as the plaintiffs have done here, in the hopes of getting an advisory opinion as to how the statute should be interpreted.

C. The Scope of the Casey Decision.

The parties in this case disagree as to the extent to which *Casey* governs the issues in this case. Defendants submit *Casey* is controlling and that S.B. 60 falls squarely within the scope of that decision. Plaintiffs argue that the scope of *Casey* is more narrow. They submit that because the Court in *Casey* relied on the factual record in making its determinations, each subsequent abortion law must be scrutinized on an individual basis, based upon its own factual record.

The Court in *Casey* did not purport to create a *per se* rule as to the constitutionality of future abortion legislation. Under *Casey*'s new standard the court must, even in the context of a facial challenge, look at the factual record to determine the statute's impact on the relevant class of women. However, where an abortion statute is equally (or less) restrictive than the Pennsylvania statute upheld in *Casey*, a review of the factual record would be a futile exercise unless there is a reasonable expectation that circumstances in the forum state are materially different from circumstances in Pennsylvania, so that the same restriction, which is not unduly burdensome in Pennsylvania, would be found to impose an undue burden in the forum state.

In the instant case, because S.B. 60 is less restrictive than the Pennsylvania abortion statute, plaintiffs may not prevail unless they show material differences between the circumstances of Utah and Pennsylvania.

Plaintiffs have not met this burden. An examination of the record reviewed by the Supreme Court in *Casey* reveals the extent to which that case is controlling in the instant case. There, the district court made specific findings as to the effects of the Pennsylvania law. The district court found that the law, among other things, would: require at least two visits for every woman (as discussed above); force women to double their travel time, or stay overnight; increase the cost of the abortion; increase the opportunity for harassment from antiabortion demonstrators; and create a significant delay for most abortions -- ranging from 48 hours to two weeks. The district court found that the delay would have a negative impact on the physical and psychological health of some women and that it would increase the medical danger of the abortion in some cases. It further found that the requirement would be "particularly burdensome" for poor women, young women, battered women, working women, and women from rural areas. *See Casey I*, 744 F. Supp. at 1351-52. Notwithstanding these findings on the record, and based thereon, the United States Supreme Court held that the Pennsylvania law is not unconstitutional. The High Court stated: "These findings are troubling in some respects, but they do not demonstrate that the waiting period constitutes an undue burden." *Casey*, 112 S. Ct. at 2825.

A review of plaintiffs' Complaint in the instant case shows no factual allegations materially different from those already considered by the United States Supreme Court in *Casey*. Plaintiffs allege that S.B. 60 will burden the right to abortion by: forcing overnight stays, increasing travel and medical costs, delaying the abortion procedure, increasing medical risks, interfering with the physician's discretion, and increasing opportunities for harassment by anti-abortion protesters. Plaintiffs also stress the particular burden that S.B. 60 will place on poor, disadvantaged, employed, young, and battered women. *See Amended Complaint*, at 35-

47 (dkt. 23).

None of these alleged burdens is different from the record in *Casey*.[10] Each allegation was included in the findings of the Pennsylvania district court. They have been duly considered and rejected as constituting undue burdens by the United States Supreme Court. There is nothing significantly different between Utah's S.B. 60 and the Pennsylvania statute, and there is nothing significantly different in the way in which the statutes will affect women in Utah as compared to women in Pennsylvania.[11]

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[10]At oral argument, plaintiffs contended that the Casey Court did not consider the statute's effect on rape victims and women with fetal anomalies. Such women, plaintiffs assert, are more likely to seek late-term abortions. Plaintiffs argue that the stress caused by a waiting period/information requirement may cause such women to suffer physical and psychological damage.

The record reviewed by the Court in Casey, however, contained a finding that the statute would delay the performance of abortions and that it would have a negative impact on the physical and psychological health of some women. All Casey I, 744 F. Supp. at 1351-52. These findings were found in Casey to be insufficient to impose an undue burden on a facial challenge.

Plaintiffs' allegations might add two more categories to the class of women to whom the statute is "particularly burdensome." They do not, however, show that the burden is any greater than what was found to be constitutionally permissible by the United States Supreme Court in Casey.

[11]It could be argued that because Utah is geographically larger than Pennsylvania, with only one major metropolitan area, the waiting period's burden is greater on rural women in Utah because they have farther to travel to get to the abortion clinic. This argument, however, is a red herring. The burden imposed by the waiting period is the same for rural women in both states.

All women seeking abortions, whether or not there are any state laws regulating abortion, are required to travel to the clinic to have the

(continued...)

Plaintiffs would have this court reach the anomalous conclusion that, although there are no material differences between the two states, a law which is constitutional in one state is facially unconstitutional in the other.

Plaintiffs had no case from the beginning. Even if all of plaintiffs' allegations are accepted as fact, under *Casey* S.B. 60 imposes no undue burden on the right to an abortion. Where a state passes abortion legislation which is less than

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[11](...continued)
abortion performed. This travel burden is not a factor of state law. The fact that travel is involved in getting to a clinic has absolutely nothing to do with the constitutional inquiry here. A woman in Alaska, for example, could be required to travel 800 miles to get to an abortion clinic merely because she lives in one place and the nearest abortion clinic is on the other side of the state. But that certainly doesn't constitute anything even approaching an undue burden. Roe v. Wade may have established a constitutional right to an abortion, but it did not require that a state provide abortion clinics in close proximity to every woman's home.

On the other hand, a waiting period which may require two visits to a clinic imposes an additional burden. For some women, this burden will require that they double their travel time by making a second trip to the clinic. For other women, in a worst case scenario where the distance is such that it is impracticable to make a return visit, the burden will require an overnight stay at a location near the clinic.

Regardless of the distance required to travel to the clinic, then, the most severe burden imposed by the waiting period is the same for women in both Utah and Pennsylvania -- an overnight stay at a location near the clinic. Thus, women in rural Utah who live great distances from the clinic will not have to double their travel time. Their burden, like rural women in Pennsylvania, will be the cost of an overnight stay near the clinic.

In Casey, the Supreme Court determined specifically that a law which requires a second trip to the clinic, or an overnight stay near the clinic, see Casey I, 744 F. Supp. at 1352, does not impose a substantial obstacle to the woman's right to an abortion. See Casey, 112 S. Ct. at 2825-26. Plaintiffs' longer-travel-distance arguments in this case are utterly specious.

or equal to the restrictions imposed by the Pennsylvania law, and where the plaintiffs are unable to allege any impact from the legislation which is more burdensome than was found by the district court in *Casey*, there is no viable legal cause of action. Under the broad scope of *Casey*, it would be extremely difficult, if not impossible, to bring a good faith facial challenge to the constitutionality of Utah's 24 hour waiting period/informed consent requirements.

II. THE MEDICAL EMERGENCY EXCEPTIONS

Background

Utah's medical emergency exception is governed by three sections of the statute: Utah Code Ann. § 76-7-305(1) ("section 305(1)"); Utah Code Ann. § 76-7-305(2) ("section 305(2)"; and Utah Code Ann. § 76-7-315 ("section 315").

Section 305(1): The waiting period and information requirement: medical emergency exception

This section of S.B. 60 imposes the 24 hour waiting period and the informed consent requirement. However, the section also contains an exception for medical emergencies.[12] By the very terms of section 305(1), its

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[12]The term "medical emergency" is defined in Utah Code Ann. § 76-7-301(2) as:

> that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death, or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.

(continued...)

requirements do not apply when there is a medical emergency. In an emergency situation, there is never a requirement of informed consent or a 24 hour waiting period.

Accordingly, plaintiffs' statement that "S.B. 60, when read together with provisions from Utah's 1991 abortion law, does not clearly provide that a woman can obtain an immediate abortion when necessary in a medical emergency," is not true. *Plaintiffs' Objections*, at 15. There is simply no waiting period requirement in the case of a medical emergency.

Section 305(2): The alternative information requirement in medical emergency situations

As stated above, when there is a medical emergency, the information required in section 305(1) need not be given. In such a circumstance, however, section 305(2) requires that, if possible, certain alternative information be given to the woman. This section states that, prior to performing the abortion, the physician shall inform the woman "of the medical indications supporting his judgment that an abortion is necessary." Such information, which is hardly burdensome or unreasonable, is the only information required to be given, if possible, in the case of a medical emergency.

Section 315: An exception to the alternative information requirement of section 305(2)

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[12](...continued)

This definition is nearly identical to the Pennsylvania medical health exception, which was upheld by the Supreme Court in Casey, 112 S. Ct. at 2822.

Section 315 states that even the alternative information of section 305(2) need not be given when, "due to a serious medical emergency, time does not permit compliance with [section 305(2)]." Thus, there are two exceptions to the alternative information requirement of section 305(2). The first is found in the language of section 305(2) itself -- the information need only be given "if possible." The second is found in section 315 -- the information need not be given if, because of a serious medical emergency, time does not permit that the information be given.

In summary, there is no waiting period in a medical emergency situation. The physician need only tell the woman why the abortion is medically necessary. If, however, it is not possible to do so, or-if the medical emergency is such that time does not permit, the physician need not give any information at all.

Plaintiffs' Objection to the Medical Emergency Sections

Although they object to the Report and Recommendation's analysis of the medical health exceptions, plaintiffs submit that the court must adopt the Magistrate Judge's finding as to how the law is to be construed. Plaintiffs urge the court to construe the Utah abortion law so as "to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman." *Planned Parenthood v. Casey*, 112 S. Ct. at 2822 (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682, 701 (3d Cir. 1991)). *See Report &*

Recommendation, at 74.[13]

Notwithstanding such a construction, plaintiffs assert that "the Utah law would still not adequately protect the lives and health of some women seeking abortions in Utah." *Plaintiffs' Objections*, at 14. Specifically, plaintiffs argue that "the various overlapping and conflicting health exceptions to S.B. 60" are unconstitutionally vague. *Plaintiffs' Objections*, at 13.

Plaintiffs allege that there are conflicts between two provisions of the statute which cannot be resolved and which, in effect, render the exception meaningless and unconstitutional.

Plaintiffs express confusion as to how section 315, from the 1991 law, affects the provisions of the 1993 law. Sections 315 and 305(1), plaintiffs allege, are so conflicting and confusing that "there is, in effect, no medical emergency exception to the waiting period requirement." *Plaintiffs' Objections*, at 14-15.

The court finds plaintiffs' arguments to be wholly unpersuasive and without legal foundation. They are

[13]This construction was applied by the Third Circuit Court of Appeals in evaluating the emergency medical exception to the Pennsylvania law. The Supreme Court adopted this construction in Casey.

The Magistrate Judge determined that the Utah law should be construed in the same manner. He reasoned that "[w]here the Utah Legislature adopted the [statute] from Pennsylvania, the Utah legislature must have intended the prior judicial construction to also be adopted." Report & Recommendation, at 75 n.25.

inconsistent and illogical.[14] They show apparent misunderstanding and confusion as to the clear language of the 1993 law.

Section 315 can in no way be construed to impact or nullify the medical emergency exception of section 305(1). Section 315 does not even apply to section 305(1). The two sections are mutually exclusive and would never be used in the same situation. Section 315 only applies in the case of a serious medical emergency. By its own terms, section 305(1) does not apply when there is a medical emergency. Accordingly, when there is no medical emergency, section 315 is completely irrelevant and inapplicable. When there is such an emergency, section 305(1) does not apply.

The two sections articulate different standards which are used to make different determinations. The "medical emergency" standard of section 305(1), as defined in section 301(2), is used to determine when the waiting period and informed consent requirements apply. The "serious medical emergency" standard of section 315 is used to determine whether the alternative information required in section 305(2) need be given prior to the abortion. Section 315 imposes no additional requirements on the physician. Rather, it provides the physician with greater leeway in determining whether to provide the alternative information.

No conceivable application of section 315 would negate the medical emergency exception of section 305(1). When a

[14]For example, it is difficult to reconcile plaintiffs' statement that the Utah law must be construed to "not in any way pose a significant threat to the life or health of a woman," with its bold assertion that, notwithstanding such a construction, the law "would still not adequately protect the lives and health of some women seeking abortions in Utah." Plaintiffs' Objections, at 14.

medical emergency threatens the life or health of the woman, the 24 hour waiting period and information requirements of section 305(1) simply do not apply.

Plaintiffs complain that "neither the Magistrate Judge nor defendants explained how the 'serious medical emergency' exception applies in the context of S.B. 60." *Plaintiffs' Objections*, at 19. That question is easily answered by the statute itself: The "serious medical emergency" situation is an exception to the alternative information requirement of section 305(2). When the physician determines that the emergency is such that time will not permit telling the patient the medical reasons for the abortion, the physician need not do so. This "serious medical emergency" exception applies *only* to the alternative information requirements of section 305(2). It has no application whatsoever to the information and waiting period requirements of section 305(1).

The court finds no merit in plaintiffs' arguments as to the application of section 315 to the waiting period and information requirements of S.B. 60. Accordingly, plaintiffs' objection is overruled.

Plaintiffs also object to the alleged overlap and conflict between the "if possible" exception of section 305(2) and the "serious medical emergency" exception of section 315. Plaintiffs' objections on this point are also without merit and are rejected by the court.

First, plaintiffs misstate the finding of the Report and Recommendation. Contrary to plaintiffs' assertion, the Magistrate Judge does not equate "if possible" with the medical condition being "serious." These are two separate conditions, and are listed as two separate exceptions to the

information requirement of section 305(2).[15]

There is nothing about section 315, as it is applied to section 305(2), which is unconstitutionally vague. Although the phrase "serious medical emergency" is not defined in the statute, a reasonable physician in the large fraction of cases would be able to determine whether, under the circumstances of the emergency, time would permit him or her to inform the woman as to why the abortion is medically necessary. The key focus is not the degree of seriousness of the emergency, but whether time will permit the information to be given.[16]

The language of S.B. 60 -- its statutory framework and medical emergency exceptions -- is sufficient to satisfy the standards of due process. Plaintiffs have failed to articulate one reasonable construction of section 315 which would endanger medical health. The court can conceive of no situation where a physician would be unable to understand and apply the Act in a manner which would fully protect the life and health of the woman. No reasonable physician acting in good faith, need fear prosecution under this Act.

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[15]Granted, the two terms may often overlap. In a situation where the emergency is such that time will not permit the physician to give the reasons for the abortion, it might be said that it is "not possible" to give such information.

However, as plaintiff argues, there may be circumstances where it is theoretically "possible" to convey the information, but where the emergency is such that time would not permit that the information be given without risk to health or life. The opposite might also occur. See discussion by the plaintiffs in Plaintiffs' Objections, at 19.

[16]Accordingly, the two exceptions do not completely overlap, and section 315 is not mere surplusage. Section 315 gives the physician more, not less, leeway in determining whether to give the alternative information of section 305(2) in a medical emergency situation.

SUMMARY AND CONCLUSION

Although personal beliefs on the issue of abortion may vary widely, the people of a democratic state may, through their elected representatives, assert an interest in protecting the life of the unborn so long as that protection does not violate the constitutional rights of women.

In 1993, the state of Utah passed S.B. 60, with the specific purpose of restricting abortion without violating the Constitution. The law was closely patterned after the Pennsylvania law upheld by the United States Supreme Court in *Planned Parenthood v. Casey*. Where the Utah law varies from the Pennsylvania law, it is even less restrictive and therefore less likely to violate the Constitution.

Nevertheless, plaintiffs initiated this lawsuit as a constitutional facial challenge to the Utah law. As a result, enforcement of the law has been delayed for nearly nine months, and the state of Utah has been required to engage in lengthy litigation in defending the law.

Where, as with the 1991 Utah law, the people of a state enact a law which clearly approaches or exceeds the bounds of constitutional propriety, they may well expect to defend the law against a facial challenge in federal court. However, when a duly enacted law remains clearly within the bounds of the Constitution, as set forth by clear Supreme Court authority, the state should not be unnecessarily subjected to the cost and delay of defending an unmeritorious challenge to the law.

The abortion issue is obviously one which invokes strong feelings on both sides. Individuals are free to urge support for their cause through debate, advocacy, and participation in the political process. The subject might also

be addressed in the courts so long as there are valid legal issues in dispute. Where, however, a case presents no legitimate legal arguments, the courthouse is not the proper forum. Litigation, or the threat of litigation, should not be used as economic blackmail to strengthen one's hand in the political battle. Unfortunately, the court sees little evidence that this case was filed for any other purpose.

In the present case, the court has conducted a *de novo* review of the Magistrate Judge's Report and Recommendation and plaintiffs' objections. The Report and Recommendation is extremely thorough and conscientious. This case is governed by *Casey*. There is nothing in the language of the Utah statute to make it significantly different from the Pennsylvania statute. Similarly, there is nothing in the application of these laws whether in the western towns and cities of Utah or the eastern towns and cities of Pennsylvania to demonstrate a constitutional deficiency in the Utah law. The factual record examined by the United States Supreme Court in *Casey* is in all material respects the same as the factual record examined in this case. The plaintiffs' factual submissions, legal propositions, and objections to the Magistrate Judge's Report and Recommendation are entirely without merit. With *Casey* being so clearly the United States Supreme Court's pronouncement on the legal and factual issues now before this court, and with there being no question that it is this court's clear obligation to follow that pronouncement, it would be remiss in the extreme for this court to do otherwise than summarily dismiss plaintiffs' case.

S.B. 60, the duly enacted law of the people of Utah, has not been enforced for nearly nine months. That will change today. The court hereby adopts the Report and Recommendation of the Magistrate Judge, lifts the injunction, and dismisses plaintiffs' case in its entirety with

prejudice.

Because of the absence of merit in support of plaintiffs' case and the legal frivolousness of plaintiffs' assertions in this facial challenge, plaintiffs are ordered to pay defendants' costs and attorney's fees.

IT IS SO ORDERED.

DATED this 1st day of February, 1994.

/s/
Dee Benson
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF UTAH

UTAH WOMEN'S CLINIC, INC., et al. Plaintiffs, v.	JUDGMENT IN A CIVIL CASE
MICHAEL LEAVITT, et al. Defendants.	CASE NUMBER: 93-C-407B

__ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX Decision by Court. This action came to trial or hearing before the Court The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment be entered in favor of the defendants and the plaintiffs' cause of action is dismissed with prejudice. Because of the absence of merit in support of plaintiffs' case and the legal frivolousness of plaintiffs' assertions in this facial challenge, plaintiffs are ordered to pay defendants' costs and attorney fees.

February 3, 1994 — Date
Markus B. Zimmer — Clerk

/s/ Louise Salter York
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

UTAH WOMEN'S CLINIC, INC., EDWARD R. WATSON, M.D., MADHURI SHAH, M.D., ALISSA PORTER, WENDY EDWARDS, WASATCH WOMEN'S CENTER, P.C., WILLIAM R. ADAMS, M.D., DENISE DEFA, and SARAH ROE,

Plaintiffs,

vs.

MICHAEL LEAVITT, in his individual and official capacity as Governor of the State of Utah, and JAN GRAHAM, in her individual and official capacity as Attorney General of the State of Utah,

Defendants.

MEMORANDUM DECISION AND ORDER

Case No. 93-C-407B

In its February 1, 1994, Opinion and Order, the Court ordered plaintiffs to pay the attorney's fees incurred by defendants in defense of this case, which centers on Utah's 1993 abortion regulation law. *See Utah Women's Clinic v. Leavitt*, 844 F. Supp. 1482 (D. Utah 1994). Plaintiffs now ask the Court to reconsider the Order and to rescind the

award of attorney's fees. Defendants ask the Court to sustain its earlier Order, set the amount of attorney's fees, and award costs. Having reviewed the memoranda submitted by the parties, being fully apprised, and for good cause appearing, the Court enters the following Memorandum Decision and Order.

I. INTRODUCTION

The primary issue now before the Court has nothing to do with abortion. It has everything to do with the proper use of judicial resources.

At issue is whether the plaintiffs' case meets the definition of legal frivolousness. In making such a determination, the subject matter of the underlying claim is immaterial. A finding of legal frivolousness involves the same objective process regardless whether the case concerns abortion, free speech, elections, taxes, civil rights, or any of the hundreds of other issues that come before the federal courts. *See e.g., Jane L. v. Bangerter*, 828 F. Supp. 1544 (D. Utah 1993) (frivolous abortion arguments); *Munson v. Milwaukee Board of School Directors*, 969 F.2d 266 (7th Cir. 1992) (frivolous First and Fourteenth Amendment claims); *Hutchinson v. Staton*, 994 F.2d 1076 (4th Cir. 1993) (frivolous election fraud claim); *West v. Peterson*, 71 Am. Fed. Tax Rep. 2d, at 93-915 (D. Utah Jan. 5, 1993) (frivolous Sixteenth Amendment challenge). Such a finding ensures that the courts are not misused as forums for declaring views when a party has no legitimate legal arguments to advance.

This Court's Opinion and Order entered a finding of frivolousness against the plaintiffs. The Court determined the plaintiffs knew or should have known the baseless nature of their claims. Plaintiffs have objected to that

finding. Given the nature and history of the instant case, and the nature of the plaintiffs' objections, a brief review of proper and improper uses of judicial power is in order.

A. Proper Use of Judicial Power

One of the judiciary's most time-honored principles is the requirement of a case or controversy. *See, e.g., Flast v. Cohen*, 392 U.S. 83, 96 (1968). As early as 1793, the federal judiciary recognized "strong arguments against the propriety of our extrajudicially deciding" questions outside of this context. *See* 3 Correspondence & Public Papers of John Jay at 486-89 (Johnston ed. 1891), *quoted in* Hart & Wechsler's *The Federal Courts and the Federal System* at 65-67 (3d ed. 1988). Shortly thereafter, Chief Justice John Marshall produced a brilliant exposition on the province and duty of the Article III judiciary, focusing on this same requirement. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).[1] Those early decisions charted the course of the federal judiciary.

For more than two hundred years, if there has been a constant in this nation's jurisprudence, it has been the judicial branch's insistence on a genuine dispute involving a present expectation of injury before the services of the courts will be available for a resolution of the matter. *Cf. Flast v. Cohen*, 392 U.S. 83, 96 (1968) ("' [T]he oldest and most consistent thread in the federal law of justifiability is that the federal courts will not give advisory opinions.") (quoting C. Wright, *Federal Courts* at 34 (1963)). This

[1]"The heart of the justification for judicial review offered in Marbury v. Madison, indeed, is that it arises from the duty of a court to determine the law applicable to a case properly before it for decision." 13 Charles Alan Wright et al., Federal Practice & Procedure § 3529, at 284 (2d ed. 1984) (footnote omitted).

requirement is the "bedrock of American jurisprudence. *See Valley Force Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 471 (1982).

The case or controversy requirement has force irrespective of the actual issues a party seeks to litigate. Over the years, the courts have declined to reach the merits of cases involving everything from affirmative action to accounting procedures, from the current hot issues of the day to obscure matters noticed by no one but the courts and the would-be litigants. *Compare DeFunis v. Odegaard*, 416 U.S. 312 (1974), with *United States v. Richardson*, 418 U.S. 166 (1974).

The case or controversy concept is synonymous with the American concept of judicial power. Put simply, the "judicial power" of Article III vested in the federal courts through the Judiciary Acts *is* the very power to decide cases and controversies. *E.g., Marbury v. Madison*, 5 U.S. (1 Cranch) at 170 ("The province of the court is, solely, to decide on the rights of individuals . . . ."); *Muskrat v. United States*, 219 U.S. 346, 361 (1911) (Judicial power "is the right to determine actual controversies arising between adverse litigants."); *Valley Forge Christian College*, 454 U.S. at 756-57 ("The constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity 'to adjudge the legal rights of litigants in actual controversies.'") (citation omitted); *United States v. Carrollo*, 30 F. Supp. 3, 5 (D. Mo. 1939) (Judicial power "is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision."). The use of judicial resources for any other purpose falls outside the bounds of the judicial power and constitutes a misuse of the judicial branch of government.

B. Misuse of Judicial Power

The case or controversy requirement extends into and merges with the judiciary's abhorrence of one particular misuse of the judicial branch: frivolous litigation. Supreme Court jurisprudence has often reinforced the notion that the case or controversy be *real*. "The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process." *Valley Force Christian College*, 454 U.S. at 471. "The power to declare the rights of individuals and to measure the authority of governments . . . 'is legitimate only in the last resort, and as a necessity in the determination of *real, earnest and vital controversy*.'" *Id.* (quoting *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1882)) (emphasis added). "It must be a *real and substantial controversy* admitting of specific relief through a decree of a conclusive character . . . ." *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-41 (1937) (emphasis added).

When a party brings a suit that fails to meet the case or controversy requirement, judicial doctrines of justifiability preclude the party from benefiting by improperly using the judicial branch. *See, e.g., Allen v. Wright*, 468 U.S. 737 (1984) (standing); *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (mootness); *Baker v. Carr*, 369 U.S. 186 (1962) (political questions); *International Longshoremen's Union v. Boyd*, 347 U.S. 222 (1954) (ripeness). Likewise, when a party brings a suit that initially appears to meet the case or controversy requirement but which in reality is based on illusory legal or factual foundations, judicial tools preclude the party from benefiting by improperly using the judicial branch. *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32

(1991) (fee-awards for bad faith litigation); *Christianburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 422 (1978) (fee awards for frivolous Title VII suits); *Hughes v. Rowe*, 449 U.S. 5, 15 (1980) (fee awards for frivolous civil rights suits); Note, *Inherent Sanctioning Power in the Federal Courts After Chambers v. NASCO, Inc.*, 1992 B.Y.U. L. Rev. 1209 (examining power in the federal courts for dealing with abusive litigation tactics). These tools, solidified through appellate review, are necessary to maintain the integrity of the judicial branch.

It is not always immediately clear to a court that a lawsuit lacks the requisite legal or factual foundation. A party may present a district court judge at the outset of a case with so many reams of paper that such a determination is impossible in a short period of time. However, the judge who lives with a case, studies the arguments, becomes familiar with the issues, observes the actions of the parties over an extended period, and interacts verbally with counsel, becomes aware over time whether the case is legally and factually supportable.[2]

Upon reaching the conclusion that a party has brought a frivolous claim, a court must decide whether and how to redress the misuse of judicial resources. In the civil rights context, Congress has provided the courts with just such a tool. *See* 42 U.S.C. § 1988 (1994). A plaintiff may be

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[2]"'Although in some instances a frivolous case will be quickly revealed as such, it may sometimes be necessary for defendants to "blow away the smoke screens the plaintiffs halve] thrown up" before the defendants may prevail.'" Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993) (quoting Introcaso v. Cunningham, 857 F.2d 965, 967 (4th Cir. 1988) (quoting Hicks v. Southern Maryland Health Systems Agency, 805 F.2d 1165, 1168 (4th Cir. 1986)); see also discussion infra part III.D.1.

required to pay the opposing party's attorney's fees under Section 1988 if "'a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.'"[3]

A court is not to make such a finding hastily or improperly. A court exercising its discretion must do so cautiously, careful not to abuse the discretion so vested. The potential chilling effect of a fee award, especially in civil rights cases, may be felt by future litigants.[4]

Nevertheless, by allowing defendants fee awards under Section 1988, Congress has recognized what the courts know from firsthand experience, that civil rights cases are sometimes brought which have no legitimate business in the judicial branch and which attempt to use the courts for improper purposes.

The plaintiffs in the instant case should know this from firsthand experience. In *Jane L. v. Bangerter,* 828 F. Supp. 1544 (D. Utah 1993), Judge J. Thomas Greene ordered Utah Women's Clinic, Inc., to pay attorney's fees for challenging the constitutionality of a Utah abortion statute under a-theory already clearly considered and rejected by the

[3]Hughes v. Rowe, 449 U.S. 5, 15 (1980) (quoting Christianburg Garment Co. v. E.E.O.C., 434 U.S. 412, 422 (1978)).

[4]Of course, one purpose of a fee award under Section 1988 is to deter clearly frivolous claims. Consequently, such an award should not impact potential litigants whose claims of constitutional deprivation present a legitimate case or controversy. See, e.g., Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993) ("When a court imposes fees on a plaintiff who has pressed a 'frivolous' claim, it chills nothing that is worth encouraging."); see also discussion infra part III.D.5.

Supreme Court. *See id.* at 1555-56.[5] The court imposed the fee award because the plaintiffs litigated their claims, causing their opponents to incur attorney's fees, in the face of clear and unmistakable precedent holding against their position. Unless a district court responds to such objectively unreasonable behavior, as did Judge Greene, then the courts -- institutions designed to ensure justice -- become vehicles for injustice.

The idea of shifting attorneys fees for frivolous claims is based on common sense. It does not lock the courthouse door. It merely recognizes the fairness of compensating a party for defending against an unreasonable claim. Any other result would allow a party to do at least three improper things: 1) threaten litigation to keep an opponent from doing something it had a legal right to do;[6] 2) actually engage in litigation to force an opponent to spend time and money on attorney's fees and costs; and 3) engage in litigation in an improper attempt to gain publicity for the plaintiff's cause. With the current price tag attached to litigation, these are real concerns.

A fee award in this context does not necessarily mean a party or its attorneys have acted unethically or criminally or in contempt of court. The party found to have filed a legally frivolous claim may have the best of intentions and a

[5]Judge Greene also ordered the state of Utah to pay attorney's fees to the plaintiffs for prevailing on certain other constitutional claims. See 828 F. Supp. at 1547; see also infra note 12 (discussing Jane L. in more detail).

[6]For example, a party could threaten litigation to intimidate a legislature considering enacting a new law. See infra note 23. This tactic is an abuse if the party has no legal foundation for doing so.

personal belief in his or her course of action. The inquiry is objective, not subjective.[7]

The present case meets every condition of objective frivolousness. The law is clear -- by virtue of the United States Supreme Court -- and the facts are clear -- by virtue of an immense factual record. The plaintiffs have neither the law nor the facts to survive a finding of frivolousness. In fact, it is this Court's view after much effort and repeated examination of the facts that it would be an abuse of discretion *not* to find frivolousness. To allow this type of action without at least requiring the plaintiffs to pay the other side's fees would be to encourage this type of misuse of the courts in the future.

II. BACKGROUND OF THE PRESENT CASE

The full procedural background of this litigation is explained in this Court's February 1, 1994, Opinion and Order. *See Utah Women's Clinic v. Leavitt*, 844 F. Supp. 1482 (D. Utah 1994) ("*Leavitt I*"). For purposes of this Memorandum Decision and Order; however, the Court will review the procedural background as it relates to the issue of frivolousness.

A. The History of Utah Senate Bill 60

In 1990, the Pennsylvania legislature enacted an abortion regulation statute. *See* 18 Pa. Cons. Stat. Ann. § 3205 (1990) (reproduced in pertinent part in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2833 (1992) (Appendix to Opinion of Justice O'Connor)). The general rule of the Pennsylvania statute

[7]A showing of subjective bad faith is not a prerequisite for the allowance of attorney's fees. Hughes v. Rowe, 449 U.S. 5, 14 (1980).

prohibited abortions except with the "voluntary and informed consent of the woman." *Id.* § 3205(a). Under the statute, such consent was valid only if the physician who was to perform the abortion "orally informed" the woman at least 24 hours prior to the abortion of:

> (i) The nature of the proposed procedure or treatment and of those risks and alternatives to the procedure or treatment that a reasonable patient would consider material to the decision of whether or not to undergo the abortion.
> (ii) The probable gestational age of the unborn child at the time the abortion is to be performed.
> (iii) The medical risks associated with carrying the child to term.

Id. § 3205(a)(1)(i)-(iii).

The Pennsylvania statute also required the physician or a delegated party to inform the pregnant woman that:

> (i) The department publishes printed materials which describe the unborn child and list agencies which offer alternatives to abortion and that she has a right to review the printed materials and that a copy will be provided to her free of charge if she chooses to review it.
> (ii) Medical assistance benefits may be available for prenatal care, childbirth and neonatal care, and that more detailed information on the availability of such assistance is contained in the printed materials published by the department.
> (iii) The father of the unborn child is liable to assist in the support of her child, even in instances where he has offered to pay for the abortion. In the case of rape, this information may be omitted.

Id. § 3205(a)(2). Under the statute, if the woman chose to view the materials, a copy of the printed materials was to be provided. *Id.* § 3205(a)(3). The pregnant woman was then required to certify in writing, prior to the abortion, that the mandatory information had been provided. *Id.* § 3205(a)(4).

The Pennsylvania statute also provided an exception to the general rule. Under the statute a woman did not need to be given the required information 24 hours before the abortion "in the case of a medical emergency." 18 Pa. Cons. Stat. Ann. § 3205(a) (1990). Instead,

> [w]here a medical emergency compels the performance of an abortion, the physician shall inform the woman, prior to the abortion if possible, of the medical indications supporting his judgment that an abortion is necessary to avert her death or to avert substantial and irreversible impairment of major bodily function.

Id. § 3205(b). The act defined a "medical emergency" as

> [t]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.

Id. § 3203.

The constitutionality of Pennsylvania's statute was challenged, on its face, in federal court in Pennsylvania. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 744 F. Supp. 1323 (E.D. Pa. 1990) ("*Casey I*"), the district

court struck down the Pennsylvania statute as unconstitutional. The trial judge determined that under the strict scrutiny standard of *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny, the 24-hour waiting period "unconstitutionally impose[d] a legally significant burden on a woman's rights to seek an abortion." *Casey I*, 744 F. Supp. at 1378.[8] The district court also concluded that the physician-only informed consent requirements were not narrowly tailored to serve the state's interest in protecting maternal health. *Id.* at 1380. The court further held that the statute's content-based informed consent requirement violated constitutional standards spelled out in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986). *Casey I*, 744 F. Supp. at 1380-82. Finally, the district court determined that the statute's definition of "medical emergency" departed from accepted medical practices in such a way as to violate constitutional standards established in Supreme Court jurisprudence. *See id.* at 1377-78.

On appeal, the Third Circuit Court of Appeals reviewed the statute under a different, "undue burden" standard. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682, 697 (3d Cir. 1991). Relying on its interpretation of prior Supreme Court cases, the appellate court determined to strictly scrutinize regulations imposing an undue burden on the abortion right while reviewing regulations that did not impose an undue burden under a rational basis standard. *Id.* Using this analysis, the Third Circuit reversed the legal conclusions of the district court on the informed consent requirements, including the 24-hour

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[8]The district court in Pennsylvania concluded that pursuant to Roe the "fundamental right" to an abortion "may be significantly limited only where the state demonstrates that its regulation is narrowly drawn to serve a compelling state interest." Casey I, 744 F. Supp. at 1373-74.

waiting period, finding them sufficient to pass constitutional muster. The court also found the medical emergency definition and exception constitutionally sufficient.

On final appeal, the United States Supreme Court adopted a modified version of the Third Circuit's undue burden standard, announcing the new test as "a standard of general application" in abortion statute challenges. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2820 (1992); *see also Planned Parenthood of Southeastern Pennsylvania v. Casey*, 114 S. Ct. 909, 911 (1994) (Souter, J., in chambers) ("[W]e acknowledged in *Casey* that the precise formulation of the standard for assessing constitutionality of abortion regulation was, in some respects, novel . . . ."). Under the new standard, "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." 112 S. Ct. at 2821. In affirming the Third Circuit and reversing the holding of the district court in all respects that are material here, the Court held that the Pennsylvania law's informed consent requirements, the 24-hour waiting period, and the medical emergency provisions do not place an unconstitutional restriction on a woman's right to an abortion. *See id.* at 2822-26.

In 1993, following the lead of the Pennsylvania legislature and the holding in *Casey*, the Utah legislature enacted the Utah Abortion Act Revision, Senate Bill 60 ("S.B. 60") (codified at Utah Code Ann. § 76-7-305 (Supp. 1993)). The Utah statute contains a 24-hour waiting period, informed consent requirements, and a medical emergency exception patterned deliberately after Pennsylvania's statute.

The Utah statute, like the Pennsylvania statute, requires that no abortion may be performed unless a voluntary and

informed written consent is first obtained by the attending physician from the woman upon whom the abortion is to be performed." Utah Code Ann. § 76-7-305(1) (Supp. 1993). To constitute voluntary and informed consent, the Utah statute requires that the physician who is to perform the abortion, the referring physician, or any of several other designated personnel "orally inform" the woman of:

> (i) the nature of the proposed procedure or treatment and of the risks and alternatives to that procedure or treatment that a reasonable patient would consider material to the decision of whether or not to undergo the abortion;
> (ii) the probable gestational age of the unborn child at the time the abortion is to be performed; and
> (iii) the medical risks associated with carrying her child to term.

Id. § 76-7-305(1)(a)(i)-(iii).[9]

The Utah statute also requires the physician or designated personnel to inform the pregnant woman that:

> (i) the Department of Health publishes printed material that describes the unborn child and lists agencies that offer alternatives to abortion, and that she has a right to review that printed material, which will be provided to her free of charge is she chooses to review it;
> (ii) medical assistance benefits may be available for prenatal care, childbirth, and neonatal care, and that

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[9]Under the statute, the attending physician must give this information prior to the abortion only if the attending or referring physician was not the initial information provider. See Utah Code Ann. § 76-7-305(1)(b).

> more detailed information on the availability of that assistance is contained in the printed materials published by the Department of Health; and (iii) the father of the unborn child is legally required to assist in the support of her child, even in instances where he has offered to pay for the abortion. In the case of rape, this information may be omitted[.]

Id. § 76-7-305(1)(c). If the woman chooses to review those materials, a copy of the printed materials is to be provided. *Id.* § 76-7-305(1)(d). The pregnant woman is then required to certify in writing prior to the abortion that the required information has been provided. *Id.* § 76-7-305(1)(e).

S.B. 60 also excepts compliance with the 24-hour waiting period and informed consent requirements in the event of a "medical emergency." As in Pennsylvania's statute, a medical emergency is

> that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death, or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.

Utah Code Ann. § 76-7-301(2) (Supp. 1993). In such a circumstance, the statute requires that certain alternative information be provided to the woman: the physician need only inform the woman "of the medical indications supporting [the physician's] judgment that an abortion is

necessary." *Id.* § 767-305(2).[10]

In drafting S.B. 60, the Utah legislature slavishly copied the language of the Pennsylvania statute. *See* Report & Recommendation at 44, 61. A comparison of the two statutes reveals that they are nearly word-for-word identical.[11] The drafting of S.B. 60, in light of the recently released *Casey* opinion, shows the Utah legislature intended to keep S.B. 60 clearly within the bounds of the Constitution. The lawmakers appear to have made a concerted effort to avoid placing any restriction on the right to an abortion which had not been reviewed and upheld in all respects in a very recent, detailed opinion by the United States Supreme Court.[12]

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[10]Utah law further provides the physician with two exceptions from compliance with the alternative information requirement. First, S.B. 60 provides that the alternative information need only be given "if possible." Utah Code Ann. § 76-7-305(2). If, in the case of a medical emergency, it is not possible to tell the woman why an immediate abortion is medically necessary, the physician need not do so.

Second, Utah Code Ann. § 76-7-315, which was not a part of S.B. 60, provides that the physician need not inform the woman why the abortion is necessary if "due to a serious medical emergency time does not permit" that the information be given. See infra note 22.

[11]Where S.B. 60 departs from the language of the Pennsylvania statute, it lessens the impact of the statute. See Leavitt I, 844 F. Supp. at 1486; supra notes 9-10.

[12]The legislature could understandably have wanted to avoid defending the new statute in lengthy and costly litigation, as it had been obliged to do with earlier abortion legislation. In 1991, the Utah legislature had enacted an abortion statute that clearly pushed the bounds of constitutional propriety. As a result, the state was required to expend substantial time and money in defending the constitutionality of the statute. For further background discussion of the 1991 litigation, see Leavitt I, 844 F. Supp. at 1485.

(continued...)

B. The Present Litigation: Plaintiffs' Facial Challenge to Senate Bill 60

Notwithstanding the legislature's overt attempt to enact constitutionally proper legislation, plaintiffs filed this lawsuit as a facial challenge to the constitutionality of S.B. 60. The law was passed by the legislature on February 17, 1993. It was scheduled to take effect on May 3, 1993. The plaintiffs waited until April 23, 1993, ten days before the effective date, to file a lengthy Complaint in this Court. The Complaint alleged that the statute, on its face, imposed an undue burden on the right to abortion.

Plaintiffs sought a preliminary and permanent injunction against enforcement of the statute. The Court issued a ten-day Temporary Restraining Order, staying enforcement of the act, then renewed the Order for an additional ten days. Thereafter, the parties entered into a stipulation to stay enforcement of the act until the Court had an opportunity to become acquainted with the legal and factual issues in plaintiffs' voluminous submissions and rule on plaintiffs' motion for injunctive relief.

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[12](...continued)

Ultimately, some provisions of the legislation were struck down as unconstitutional while others were upheld as constitutionally proper. See Jane L. v. Bangerter, 794 F. Supp. 1528 (D. Utah 1992) ("Jane L. I"); Jane L. v. Bangerter, 794 F. Supp. 1537 (D. Utah 1992) ("Jane L. II"); Jane L. v. Bangerter, 809 F. Supp. 865 (D. Utah 1992) ("Jane L. III"). Pursuant to 42 U.S.C. § 1988, the state was ordered to pay the attorneys fees incurred by plaintiffs in challenging those portions of the statute which were found to be unconstitutional. See Jane L. v. Bangerter, 828 F. Supp. 1544, 1547 (D. Utah 1993) ("Jane L. IV"). On the other hand, the court found several claims raised by the plaintiffs to be frivolous. Accordingly, it ordered plaintiffs to pay the attorney's fees incurred by the state in defending against frivolous claims. Id. at 1555-56.

The trial in this case was held before the magistrate judge on June 21, 1993.[13] On November 10, 1993, the magistrate judge issued his Report and Recommendation to the district court, recommending that S.B. 60 be upheld in its entirety, that plaintiffs' motion for injunctive relief be denied, and that plaintiffs' case be dismissed.

On December 6, 1993, plaintiffs filed their Objections to the Report and Recommendation of the magistrate judge. Despite losing on the merits of every claim, and despite the magistrate judge's recommendation that the case be dismissed, plaintiffs objected to only one aspect of the Report and Recommendation -- the magistrate judge's treatment of the medical emergency exception. -As to the waiting period and informed consent requirements, plaintiffs stated that they would not object if the Court agreed to "adopt" certain statutory interpretations considered by the magistrate judge.

This Court, in its February 1, 1994, Opinion and Order, *see Leavitt I*, 844 F. Supp. at 1486-87, found that plaintiffs' objections and demands were without merit and improper. The Court declined to indulge plaintiffs' inappropriate requests for an advisory opinion and conducted a *de novo* review of the factual and legal record. Finding no merit to plaintiffs' case, the Court determined that the recommendation of the magistrate judge was proper. The Court therefore adopted the Report and Recommendation, as modified by the Court's Opinion and Order, and dismissed plaintiffs' case in its entirety.

The Court further found that plaintiffs' case was

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[13]Pursuant to an agreement of the parties, the trial on the merits was advanced and consolidated with the hearing on the motion injunctive relief. See Fed. R. Civ. P. 65(a)(2).

groundless, frivolous, and unreasonable, and therefore ordered plaintiffs to pay the attorney's fees incurred by the state of Utah in defending against the litigation. The Court, having considered plaintiffs' memoranda on this issue, will now give further discussion and clarification on this ruling.

III. DISCUSSION

A. Plaintiffs' Challenge of Senate Bill 60

The key question is whether the plaintiffs, in filing their case, knew or should have known their claims lacked a legal or evidentiary foundation. *See, e.g., Crabtree v. Muchmore*, 904 F.2d 1475, 1477 (10th Cir. 1990); *Brown v. Borough of Chambersburg*, 903 F.2d 274, 277 (3d Cir. 1990); *Werch v. City of Berlin*, 673 F.2d 192, 195 (7th Cir. 1982); *Jane L. v. Bangerter*, 828 F. Supp. 1544, 1555-56 (D. Utah 1993). The answer to this question lies in 1) an evaluation of the law as it existed at the time plaintiffs filed suit, and 2) an examination of the facts plaintiffs had with which to challenge the Utah statute. If a review of the law and the facts shows a party could not reasonably have expected even the possibility of a result in its favor, then a finding of frivolousness is appropriate.

1. The Law as it Existed when Plaintiffs Filed Suit

a. The Constitutional Standard

The primary source of legal authority for this litigation was and is *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992). The district court in *Casey I* made detailed findings on the effects of the

Pennsylvania abortion statute.[14] Among other things, the district court found that the abortion statute would cause significant delays, increased costs, and physical and psychological trauma or death, and that the statute would impact most forcefully on certain identified groups of women.

It was on the basis of that factual record that the Supreme Court determined the Pennsylvania statute was constitutional. *See Casey*, 112 S. Ct. at 2825-26. As already noted,[15] the Court determined that a state may regulate abortion, so long as it does not impose an "undue burden" on the woman's right to an abortion. A regulation imposes an undue burden, the Court explained, if it has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 2820. The Court found the Pennsylvania statute to not constitute such an undue burden.

The *Casey* decision, modifying as it did *Roe v. Wade* and its progeny, was the prevailing constitutional standard for evaluating abortion legislation at the time plaintiffs filed suit.

b. The Facial Challenge Standard

Traditionally, facial challenges have been governed by *United States v. Salerno*, 481 U.S. 739 (1987). There, the Supreme Court held that to prevail on a facial challenge, the plaintiff "must establish that no set of circumstances exists under which the [statute] would be valid." *Id.* at 745. Under

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[14]The court listed 387 separate findings, comprising nearly 43 pages of the Federal Supplement. See Casey I, 744 F. Supp. at 1329-72.

[15]See supra part II.A.

this standard, there is typically very little need, if any, for factual inquiry. If the state can show any circumstance in which the statute could be applied in a constitutional manner, the challenge fails and the law is upheld as facially valid.[16]

The Supreme Court's decision in *Casey* applied a somewhat different test in evaluating the Pennsylvania law. Rather than determining whether the statute could be applied constitutionally in any circumstance, the Court focused its inquiry on the relevant class likely to be affected by the statute. *See Casey*, 112 S. Ct. at 2830 (analyzing whether a substantial obstacle to a woman's abortion choice existed in "a large fraction of the cases in which [the statute] is relevant"). Furthermore, the Court specifically looked at the factual record developed by the district court in assessing whether the statute was unduly burdensome. *See, e.g., id.* at 2822, 2826-27.

In *Casey*, the Supreme Court did not expressly reject or alter the *Salerno* standard. *See Ada v. Guam Society of Obstetricians & Gynecologists*, 113 S. Ct. 633 (1992) (Scalia, J., dissenting from denial of certiorari) (observing that the Supreme Court in *Casey* "did not purport to change this well-established [*Salerno*] rule"). On the other hand, the *Casey* Court clearly departed from the *Salerno* standard in

[16]The sole purpose of a facial challenge is to determine whether a statute is capable of being applied in a constitutional manner. A facial challenge is not a request for an advisory opinion on how a statute will be interpreted or enforced. When a statute is subject to more than one interpretation, it is facially valid if one of those interpretations is constitutional – regardless whether other interpretations would render the statute unconstitutional. See Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 504 (1990); Planned Parenthood v. Ashcroft, 462 U.S. 476, 493 (1983) (Powell, J.).

applying the new undue burden test to the Pennsylvania statute. Justices O'Connor and Souter have since opined that courts examining post-Casey abortion challenges should apply the undue burden standard by looking to the record to determine whether the restriction is invalid in a "large fraction of cases" in which the statute is relevant. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 114 S. Ct. 909, 910 (1994) (Souter, J., in chambers); *Fargo Women's Health Organization v. Schafer*, 113 S. Ct. 1668, 1669 (1993) (mem.) (O'Connor, J., concurring in denial of stay). The Supreme Court itself has not yet addressed this issue as a body.[17]

For purposes of this Court's frivolousness analysis, the Court will assume the *Casey* "large fraction of cases" standard prevailed at the time this suit was filed.[18] Under this standard, each case calls for an individualized analysis of the facial challenge. The reviewing court must look to the factual record to determine the impact on the relevant

[17]Lower courts, in dealing with the issue of which standard to apply, have differed in their post-Casey approach. In Barnes v. Mississippi, 992 F.2d 1335, 1342 (5th Cir. 1993), the Fifth Circuit applied the Salerno standard. More recently, the Eighth Circuit, in attempting to evaluate a facial challenge to a North Dakota abortion statute, chose to evaluate the statute under both standards – finding that "whether the undue burden test of Casey replaces the Salerno test" is an issue that "only the Supreme Court can ultimately decide." Fargo Women's Health Organization v. Schafer, 18 F.3d 526, 529 (8th Cir. 1994).

[18]In doing so, the Court is giving plaintiffs the benefit of the doubt as to which legal standard applied. Under the Salerno standard, the plaintiffs would have had to show that S.B. 60 could not be applied constitutionally in any circumstance, a showing impossible for the plaintiffs to make.

class likely to be affected by the statute.[19]

c. Plaintiffs' Burden of Proof

Accordingly, plaintiffs' burden was to show that S.B. 60 is incapable of being constitutionally applied in a large fraction of cases to which the law is relevant. In other words, plaintiffs were required to create a factual record to show that S.B. 60 would impose a substantial obstacle to an abortion for a large fraction of women seeking abortions in Utah.

The factual record is particularly important in this case. Because the language of S.B. 60 is virtually identical to the language of the Pennsylvania statute upheld in *Casey*, plaintiffs' challenge would have to be to the factual application of the statute in Utah. Plaintiffs' burden was to show that the statute's impact on the relevant class of women in Utah would be different from and more severe than its impact in Pennsylvania. To accomplish this, plaintiffs would be required to show that the factual circumstances in Utah are significantly different from *Casey*'s factual record, making a restriction that is facially valid in one state facially invalid in another.

2. Plaintiffs' Factual Record

In the present litigation, plaintiffs created a voluminous

[19]The Court has followed this approach throughout the present litigation. Plaintiff was allowed to create a lengthy factual record and was given a full trial on the merits. The Court, as the finder of fact, examined S.B. 60 in light of the factual evidence presented by plaintiffs to determine whether the statute imposes an undue burden on the right to an abortion in the large fraction of relevant cases in Utah. See discussion infra part III.D.2.a.

factual record. Plaintiffs submitted over 70 factual declarations, comprising several hundred pages on the imminent consequences of S.B. 60.[20] These declarations include the testimony of doctors who perform abortions, abortion clinic operators and staff, present and former patients of the clinics, and others. The testimony submitted was used to show the potential impact of S.B. 60. *See* Plaintiffs' Pretrial Memorandum of Points and Authorities (docket no. 60) at 23-30 (summarizing plaintiffs' evidence); Report & Recommendation at 6-43 (discussing plaintiffs' factual submissions in detail).

The Court has conducted a *de novo* review of plaintiffs' factual submissions. Much of plaintiffs' evidence is redundant, irrelevant, anecdotal, and argumentative. However, the Court has been liberal in allowing and considering plaintiffs factual submissions. For purposes of the Court's frivolousness analysis, the Court will give the plaintiffs the benefit of every doubt, factually as well as legally.

3. The Court's Finding of Frivolousness

As this lawsuit unfolded before the Court, it became painfully apparent that plaintiffs never should have brought this case. Plaintiffs' suit amounted to little more than an attempt to reverse *Casey*, a power this Court does not have. Comparing the law as it existed at the time this suit was filed with the factual record created by plaintiffs compelled a finding of frivolousness and compels one now. Plaintiffs' evidence was wholly insufficient to ever hope to meet the

[20]Pursuant to an agreement of the parties, no live testimony was presented at trial. Accordingly, all evidence presented in this case was submitted in written form. See Order dated May 24, 1993 (docket no. 36) at 2.

undue burden standard in the context of a facial challenge. A more particularized review of the impact of the provisions in each state unmistakably illustrates this point.

a. The 24-Hour Waiting Period

The *Casey I* district court specifically found that

> [b]ecause most of plaintiff-clinics and plaintiff-physicians do not perform abortions on a daily basis, the mandatory 24-hour waiting period will result in delays far in excess of 24 hours. For the majority of women in Pennsylvania, delays will range *from 48 hours to two weeks*.

Casey I, 744 F. Supp. at 1351 (emphasis added). These delays would "force every woman seeking an abortion in Pennsylvania to make a minimum of two visits to an abortion provider." *Casey I*, 744 F. Supp. at 1351.

The *Casey I* district court further found that the 24-hour waiting period would result in lengthy travel time; double travel time; overnight stays near the abortion clinic; costs incurred from travel, lodging, child care, and lost wages; possible medical danger associated with the delay; physical and psychological risks, and increased risks of complications; risk of harassment from anti-abortion protesters; and increased risk of death to the woman. *See id.* at 1351-52. The district court concluded that the statute would be

> particularly burdensome to those women who have the least financial resources, such as the poor and the young, those women that travel long distances, such as women living in rural areas, and those women that have difficulty explaining their

> whereabouts, such as battered women, school age women, and working women without sick leave.

Id. at 1352.

The Supreme Court, reviewing the 24-hour waiting period and its impact, observed that

> [t]hese findings are troubling in some respects, but they do not demonstrate that the waiting period constitutes an undue burden. . . . [U]nder the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest.
> . . . Hence, on the record before us, and in the context of this facial challenge, we are not convinced that the 24-hour waiting period constitutes an undue burden.

Casey, 112 S. Ct. at 2825, 2826.

In the instant case, the plaintiffs' Complaint alleged that the 24-hour waiting period in Utah would "force a substantial number of women who want abortions in Utah to make two visits to the clinic where the abortion is to be performed." Plaintiffs' Complaint at 29. Plaintiff alleged the act would also increase costs to women seeking abortions; force women to make an overnight stay; increase health risks; increase exposure to antiabortion protesters; place particular burdens on poor women, rural women, battered women, and young women; and result in delays in excess of 24 hours. *See id.* at 28-33; Plaintiffs' Amended Compl. at 28-33; Plaintiffs' Pretrial Mem. at 23-30.

The plaintiffs seem to have used the *Casey* record as a

blueprint for developing their evidence. Plaintiffs' submissions mirror the *Casey* findings with uncanny precision in many respects. *See Leavitt I*, 844 F. Supp. at 1490-91. Plaintiffs had nothing substantively new to offer.

To the extent they differ, the projected impact in Utah would not be nearly so harsh as that in Pennsylvania. In Pennsylvania, for example, "most plaintiff-clinics and plaintiffphysicians do not perform abortions on a daily basis." *Casey I*, 744 F. Supp. at 1351. In contrast, the evidence in Utah shows that the two plaintiff clinics (which perform over 9896 of all reported abortions in Utah) perform abortions five days a week. *See* Declaration of Alissa Porter (docket no. 38, exh. l) at 3 Declaration of Dr. William Adams (docket no. 38, exh. 6) at 2. Thus, in Utah, the waiting period would not create the same delays as in Pennsylvania and would be less of an obstacle to the abortion right.

Plaintiffs also argued that rural women in Utah would face greater burdens than rural women in Pennsylvania: The Court has rejected this argument as specious. *See Leavitt I*, 844 F. Supp. at 1491 n.11. The worst-case burden imposed on rural women is the same in both states. This burden was specifically found by the Supreme Court not to be a substantial obstacle to the abortion right. There is no requirement that abortion clinics be in close geographical proximity to all women in America. The only question is whether the long-distance travel requirement coupled with the 24-hour waiting period is unduly burdensome. The Supreme Court in *Casey* unequivocally said it is not. In both states the worst-case scenario is an overnight stay. The fact that a rural Utah woman may travel 300 miles compared to a rural Pennsylvania woman traveling 150 miles has absolutely no legal or factual significance.

Plaintiffs also presented evidence of the impact of the statute on groups of women "different" from those considered in *Casey*. Plaintiffs introduced evidence, for example, of the statute's effect on women from out of state, women with cultural barriers, women who are the victims of rape and incest, and women with fetal abnormalities. These groups are not different in any real sense; they are but subsets of groups specifically addressed in *Casey*. The primary "barriers" imposed on women from out of state, according to plaintiffs, are traveling long distances or making two trips, both scenarios specifically considered in *Casey*. While the Utah act may "increase the suffering and mental anguish" of rape or incest victims or women with fetal abnormalities, *see* Plaintiffs' Pretrial Mem. at 32, the *Casey* record specifically recognized the "negative impact on both the physical and psychological health of some patients *Casey I*, 744 F. Supp. at 1352. And women with "cultural barriers are inherent in a pluralistic society, in Pennsylvania as well as in Utah, a fact implicit in *Casey*'s constitutional affirmance of a statute affecting *all women* in Pennsylvania.

Moreover, the impact of the statute on these groups, or subgroups, is significantly less severe than the impact on some of the other groups discussed in *Casey* such as battered women. In fact, the district court in *Casey I* found the statutory provisions could increase the risk of *death* to women awaiting abortions, a risk that transcends state lines, cultural differences, and categorical labels. *See* 744 F. Supp. at 1352. Even considering such drastic potentialities, the Supreme Court upheld the provisions.

Plaintiffs had no basis for challenging the 24-hour waiting period in Utah. None of plaintiffs evidence on the impact in Utah even approaches the severe impact of the statute in Pennsylvania. Plaintiffs nevertheless went forward

with their lawsuit. The Court concludes that to cover the same ground in this litigation with the same types of facts but with a decidedly less burdensome factual record is, objectively, a flagrant misuse of judicial resources.

b. The Informed Consent Requirement

The *Casey I* district court also found that the physician-only disclosure requirements and the content-based informed consent requirement would, among other things, leave physicians less time to provide needed medical services; add costs to abortion providers, which would be passed on to women seeking abortions; require extensive changes in the operating schedules of the abortion clinics and doctors; create undesirable and unnecessary anxiety, anguish, and fear in women seeking abortions; create the impression in women that the state disapproves of the woman's decision; undermine the physician's ability to counsel a patient according to her individual needs; and even cause doctors to discontinue performing abortion procedures. *See Casey II*, 744 F. Supp. at 1352-55.

The Supreme Court, reviewing the informed consent provisions in light of the district court's findings, upheld the provisions. The Court reasoned that "as with any medical procedure, the State may require a woman to give her written informed consent to an abortion." *Casey*, 112 S. Ct. at 2823 (citing *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 67 (1976)). The Court found no constitutional violation in "the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus." *Id.* "In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may

elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Id.*

> In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to insure an informed choice, one which might cause the woman to choose childbirth over abortion. This requirement cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden.

Id. at 2824. The Court also rejected the plaintiffs' argument that the requirements violated First Amendment free speech rights. *Id.* The Court thus concluded that the informed consent requirement, including the requirement that the physician provide the information, did not violate constitutional standards. *Id.*

The plaintiffs in the instant case attacked the Utah informed consent provisions as vague and unclear and as "intended" to place "an undue burden on women's right to choose an abortion." Plaintiffs' Compl. at 40. The plaintiffs also alleged the provisions were overbroad, confusing, and state-mandated. *Id.* at 40-42. The Complaint also stated that the information provided, although it might be "technically accurate," could be "misleading, unnecessary, unsubstantiated and not designed to foster the health of the woman." *Id.* at 42. Finally, the plaintiffs attacked the provisions as violating their First Amendment free speech

rights. *Id.* at 47-49.[21]

In this instance, plaintiffs' predicted impact fails to even approximate the burdensome findings of *Casey I*. Plaintiffs' challenge seems instead to have been to the language of the provisions, language that was specifically upheld by the Supreme Court. Again, plaintiffs have attempted to relitigate *Casey*. The challenged provisions in S.B. 60 are the exact provisions in Pennsylvania's statute, with only an occasional nonmaterial or mitigating variation. The plaintiffs had no facts different from those in *Casey* that would provide a basis for a different result. In fact, the *Casey I* court's findings were drastically more severe on this point than anything plaintiffs submitted in the instant case. Based on their relatively skimpy factual support when compared with *Casey*'s record, the plaintiffs' attack of the informed consent requirements was nothing if not blatantly meritless.

c. The Medical Emergency Exception

The district court in *Casey I* recognized the need for a medical emergency exception, but found the Pennsylvania act's exception "far from adequate," reasoning that the definition "interferes with the physician's independent medical judgment." *Casey I*, 744 F. Supp. at 1377. The district court further found that the definition 'may compel a physician to act against his own best judgment and creates an unconstitutional trade off between the woman's health and the life or health of the fetus.'" *Id.* (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 686 F. Supp. 1089, 1137 (E.D. Pa. 1988)). The court identified

[21]Plaintiffs' Amended Complaint and plaintiffs' evidence offered more of the same. See Plaintiffs' Am. Compl. at 37-49; Plaintiffs' Pretrial Mem. at 23-30.

examples of "serious conditions" that could pose a serious health risk but not fall within the definition of medical emergency: e.g., preeclampsia, inevitable abortion, and premature ruptured membrane. *Id.* at 1378. The court concluded that in light of Supreme Court precedent the narrow definition was constitutionally unsound.

The Third Circuit, while recognizing that the medical emergency definition could be interpreted in an unconstitutional manner, construed the definition in the context of that facial challenge so that the "serious conditions" identified by the district court would trigger the medical emergency exception. 947 F.2d at 701. On final appeal, the Supreme Court adopted the Third Circuit's constitutional construction, concluding that "the medical emergency definition imposes no undue burden on a woman's abortion right." 112 S. Ct. at 2822.

The Utah statute's medical emergency definition faithfully tracks the language of the Pennsylvania statute. Still, the plaintiffs' Complaint attacked the Utah medical emergency as "vague, confusing, and capable of differing interpretation Plaintiffs' Compl. at 35; *see also* Plaintiffs' Am. Compl. at 3537. The plaintiffs alleged that "[because of the extremely narrow scope of the medical emergency definition, the Act would impose an undue burden on the right to an abortion for many women for whom a 24-hour delay would pose a serious health risk, but who do not fall within any or all of the medical emergency exceptions." *Id.* Plaintiffs listed as examples women with inevitable abortion, premature ruptured membrane, preeclampsia, hypertension, and poorly controlled diabetes." *Id.*

How the plaintiffs could attempt such an argument in light of *Casey*'s record is difficult to understand. Plaintiffs have not alleged that women in Utah suffer health risks

from pregnancy that are significantly different from those suffered by women in Pennsylvania. The medical emergency exception gives physicians in Utah broad discretion, precisely as it did in Pennsylvania. Plaintiffs have no evidence that would suggest otherwise. The plaintiffs' allegations, none of which are novel, demonstrate the groundless, baseless, frivolous, and unreasonable nature of the plaintiffs' claims.[22]

d. Summary

In evaluating plaintiffs' factual foundation this Court in its February 1, 1994, Opinion and Order made the following conclusions:

> There is nothing significantly different between Utah's S.B. 60 and the Pennsylvania statute, and there is nothing significantly different in the way in which the statutes will affect women in Utah as compared to women in Pennsylvania.
>
> Plaintiffs would have this court reach the anomalous conclusion that, although there are no material differences between the two states, a law which is constitutional in one state is facially unconstitutional in the other.
>
> Plaintiffs had no case from the beginning. Even if all of plaintiffs' allegations are accepted as fact, under *Casey* S.B. 60 imposes no undue burden on the right to an abortion. Where a state passes abortion legislation which is less than or equal to the restrictions imposed by the Pennsylvania law, and where the plaintiffs are unable to allege any impact from the legislation which is more burdensome than was found by the district court in *Casey*, there is no viable legal cause of action.

Leavitt I, 844 F. Supp. at 1490-91. Those findings were the basis for the Court's finding of frivolousness. Today, the Court reaffirms that finding.

Although voluminous, there is no material evidence in plaintiffs' record that was not considered by the Supreme Court in *Casey*. *Compare* Plaintiffs' Pretrial Mem. at 23-30 (summarizing plaintiffs' evidence) with *Casey I*, 744 F. Supp. at 1351-55. The *Casey I* district court made its findings abundantly clear in its opinion. The plaintiffs in the instant case not only produced evidence of the precise nature considered by the Pennsylvania district court and ultimately the Supreme Court, they failed to produce evidence that would even come close to the magnitude of the Pennsylvania district court's "parade of horribles."

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[22]Plaintiffs also challenged an existing provision of law, Utah Code Ann. § 76-7-315. This section was previously challenged and upheld in federal court. See Jane L. III, 809 F. Supp. at 877-80. Plaintiff Utah Women's Clinic, Inc., was a party to that action.

Plaintiffs in the instant action argued that Section 315, which excepts physicians from informed consent provisions in the event of a "serious medical emergency," left physicians with no guidance as to how the provision works in the context of the statutory framework. This argument is legal frivolousness. Jane L. III held that the provision was clear in granting deference to an attending physician to address each case on an individual basis using the professional judgment physicians regularly employ. Id. S.B. 60 did not alter Section 315.

No physician acting in good faith would be unable to understand and apply the statute in its present form. See Leavitt I, 844 F. Supp. at 1491-94. The serious medical emergency provision places no restrictions on the right to an abortion. It places no additional duties on the physician, but rather provides an additional excuse from compliance with the information requirements plaintiffs claimed were so burdensome. Had plaintiffs assessed the statute reasonably they would have recognized Section 315 as beneficial to their position. Instead, they used it to fuel their already frivolous litigation.

Plaintiffs have been unable to establish any circumstance in Utah which would make the impact of the statute more severe here than in Pennsylvania. Under all the facts they presented, taken as true and admissible in all regards, plaintiffs could not have reasonably believed that *Casey* was not controlling -- both legally and factually. Even if all doubts are resolved in plaintiffs' favor, the Court finds that plaintiffs should have known there was insufficient evidence to even allege a violation of the undue burden standard. Plaintiffs could not have reasonably believed S.B. 60 would impose an undue burden in a large fraction of relevant cases. To proceed with their challenge was legally unreasonable and overtly frivolous.

B. Plaintiffs' "Objections" to the Report and Recommendation of the Magistrate Judge

Plaintiffs' memorandum objecting to the magistrate judge's Report and Recommendation contains further examples of frivolous legal arguments. There, in light of the magistrate judge's thorough and reasoned analysis, which recommended that plaintiffs' case be dismissed in its entirety, plaintiffs appeared to abandon all hope of prevailing on the merits of this litigation. Rather, the tactic of plaintiffs' counsel became one of winning further benefits for their clients by obtaining favorable judicial pronouncements on various legal issues not necessarily related to the merits of this litigation.

Thus, in their "objections," plaintiffs declared that they would *not object* to the recommended dismissal of their case if this Court agreed to "adopt" certain constructions of the magistrate judge and to further clarify other issues requested by the plaintiffs. Specifically, plaintiffs stated that this court must:

> (1) [accept] the R&R's construction of the statutory term Morally inform"; (2) [accept] the R&R's conclusion that a physician could only be subjected to prosecution if he or she acted in bad faith with the intent to violate the statute; and (3) clarif[y] that physicians who comply with the Act are insulated from civil as well as criminal liability.

Plaintiff's Objections to R&R at 6. Plaintiffs also demanded that this Court accept the Report and Recommendation's discussion of Utah Code Ann. § 76-7-305(1)(c)(iii), as to the proof required to trigger the rape exception to that provision. *See* Plaintiffs Objections to R&R at 5 n.5.

Plaintiffs' demands were unrelated to the legal merits of this litigation. Plaintiffs were not entitled in a facial challenge to obtain a binding opinion on how S.B. 60 must be interpreted by the state. *See Leavitt I*, 844 F. Supp. at 148890. Furthermore, the issue of civil liability for physicians who comply with the act is entirely unrelated to the merits of this lawsuit and was not properly raised to the Court. *See id.* at 1482 n.7. Notwithstanding the irrelevance of these issues, plaintiffs demanded that the Court adopt favorable rulings on these issues in return for their not objecting to the dismissal of their case.

Plaintiffs show a marked inability to distinguish between those arguments which are properly raised to a court and those which are appropriate in the political arena. Plaintiffs have attempted to improperly use the Court to gain favorable rulings on a variety of issues -- regardless of their relation to the merits of the case. Such tactics exhibit a severe misunderstanding of the role of the judiciary.

C. Clarification of the Telephonic Communication Issue

Plaintiffs' tactics throughout the course of this litigation suggest that this lawsuit was filed, not with a reasonable belief that S.B. 60 was facially invalid, but rather for a variety of objectively improper purposes, one of which was an attempt to obtain an advisory opinion from the Court on the telephonic communication issue.[23] The ostensible end of plaintiffs lawsuit, at least in part, was an attempt to ensure that face-to face visits would not be required under S.B. 60 as they were under the Pennsylvania statute.

This effort is evident when reviewing the history of this litigation. After S.B. 60 was enacted, plaintiffs sent a letter to the Utah Attorney General's office seeking clarification on the telephonic communication issue. When the Attorney General declined to issue an opinion on the subject, which was her prerogative, plaintiffs responded by filing this lawsuit. On numerous occasions, plaintiffs have stated that "had the Attorney General clarified that face to face communication . . . is not required, this entire lawsuit might have been avoided." Plaintiffs' Objections to R&R at 4 n.3.

Plaintiffs' fears as to the two-visit requirement may have been legitimate. However, the filing of a facial challenge was an improper and abusive attempt to alleviate those fears. Plaintiffs' remedy, if any, was to wait until after

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[23]The Court does not know all the purposes plaintiffs may have had in mind when filing suit. Plaintiffs' tactics suggest an attempt to delay enforcement of the statute, harass state officials, send a message to the legislature that any abortion regulation would be challenged, and gain publicity for their cause. The unfortunate outcome of this lawsuit is that plaintiffs seem to have succeeded on each of these counts. In this sense, distorted as it may be, plaintiffs are perhaps perversely correct in advancing themselves as the "prevailing party." See Plaintiffs' Memorandum in Support of Motion to Alter or Amend at 10 n.7. Unfortunately, plaintiffs' "victory" comes at the expense of taxpayers and state officials acting well within the bounds of the Constitution.

the statute became effective. At that time, plaintiffs would be allowed to bring an as-applied challenge -- if the state enforced the statute in an unconstitutional manner. Plaintiffs, however, were not content to wait until after the statute went into effect. Instead, plaintiffs initiated this lawsuit in an apparent attempt to gain a preliminary, advisory opinion on the telephonic communication issue.

Plaintiffs' improper tactics continued as the litigation progressed, as illustrated by their response to the Report and Recommendation of the magistrate judge. Now, plaintiffs continue to misconstrue and misunderstand the rulings of this Court. Despite this Court's lengthy discourse and strong language on the issue, *see Leavitt I*, 844 F. Supp. at 1486-90, plaintiffs persist in maintaining that this Court has "adopted" the telephonic communication interpretation of S.B. 60. Plaintiffs tout this fact as one of the "benefits" derived from this lawsuit, and hold it out as a basis for arguing that the lawsuit was not frivolous. *See* Plaintiffs' Mem. Sup. Motion to Alter/Amend at 9-10.

Because plaintiffs have apparently been unable or unwilling to understand the implications of the magistrate judge's Report and Recommendation or this Court's Opinion and Order, the Court will now give further clarification on those rulings, as they pertain to the telephonic communication issue.

1. Possible Interpretations of the Term "Orally Inform"

S.B. 60's requirement that women be "orally inform[ed]" is subject to at least two different interpretations. "Orally" may allow for the mandated information to be provided over the telephone or it may require a face-to-face encounter. Under the language of the statute, either interpretation is plausible. There are legitimate

arguments in favor of each interpretation.[24]

If S.B. 60 is interpreted to allow for telephonic communication, it is clearly constitutional in a large fraction, indeed all, of the relevant cases. A telephone call is simply not a substantial obstacle to the abortion right. No reasonable plaintiff could argue otherwise.[25]

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[24]There is nothing about the term "orally inform" which would suggest that face-to-face communication is required. Oral information is routinely exchanged over the telephone. Had the legislature intended to require a face-to-face visit, it could be argued, it would have done so explicitly.

On the other hand, there are compelling arguments in favor of the face-to-face construction. When Utah adopted the term "orally inform" from Pennsylvania, that term had previously been construed by the district court in Casey I to require two visits to the clinic. See Casey I, 744 F. Supp. at 1351. When a legislative body adopts a statute from another jurisdiction, the presumption is that it intended to adopt that jurisdiction's judicial construction of the statute. See Report & Recommendation, at 75 n.25 (citing Jensen v. Intermountain Health Care Inc., 679 P.2d 903, 904 (Utah 1984); Bennett Association v. Utah State Tax Commission, 19 Utah 2d 108, 426 P.2d 812 (1967); Andrus v. Allred, 17 Utah 2d 106, 404 P.2d 972 (1965); State v. Hunt, 13 Utah 32, 368 P.2d 201 (1962); State v. Johnson, 12 Utah 2d 220, 364 P.2d 1019 (1961)). Under this rule of statutory construction, the Utah legislature presumably intended to adopt the two-visit requirement as well.

There are other, practical arguments in favor of the face-to-face interpretation. For example, it may be difficult to verify the identity of the party on the telephone. In addition, face-to-face communication might be necessary to adequately provide the patient with the required information and to respond to the patient's needs.

Additional arguments, irrelevant to the instant motions and to a facial challenge in general, may exist for either interpretation.

[25]A review of plaintiffs' factual record confirms this finding. The vast majority of plaintiffs' evidence deals with the obstacles imposed by requiring two visits to the clinic. Nothing in plaintiffs' evidence suggests that a telephone call is a substantial obstacle to the abortion right.

(continued...)

Thus, for this reason alone S.B. 60 is not the proper subject of a facial challenge. Because it is clearly capable of an interpretation which renders it constitutional, it is facially valid. Even if it is capable of another interpretation, which may or may not be constitutional, that fact is irrelevant in a facial challenge analysis.[26]

However, in *Casey* the Supreme Court specifically and unequivocally found a face-to-face visit requirement to be constitutional. Thus, plaintiffs had no grounds for arguing that the statutory language, if interpreted to require two face-to-face visits, could possibly be considered unconstitutional. Such an argument would be a direct assault on *Casey*. Accordingly, even without the telephonic communication interpretation, based on the factual record and in light of *Casey*'s holding, the basis of plaintiffs' lawsuit was meritless.

In short, both possible interpretations of the statute's requirement that a woman be "orally informed" of the consequences associated with her abortion decision were

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[25](...continued)

Although plaintiffs originally argued that S.B. 60 was unconstitutional under either interpretation, they later conceded that the statute would be constitutional if the telephonic communication interpretation were adopted. See Plaintiffs' Objections to R&R at 2-8.

[26]In evaluating a facial challenge, a court should interpret the statute only to the extent necessary to determine whether it is capable of constitutional application. The court is not required, or even authorized, to speculate further as to how the statute should be interpreted or enforced by the state. Thus, when a statute is capable of two or more interpretations, courts follow a judicial policy of adopting the interpretation which is least likely to offend the Constitution. See Akron Center for Reproductive Health, 497 U.S. at 514; Leavitt I, 844 F. Supp. at 1488; Report & Recommendation at 103.

clearly constitutional when plaintiff filed suit. The plaintiffs had no grounds for challenging such a requirement in light of *Casey*'s recent and direct holding and given the record in this case.

2. The Nonbinding Nature of This Court's Interpretation

Whether S.B. 60 should be interpreted to require two physical face-to-face communications or to allow for telephonic communication *will not be determined in this litigation. This Court has not ruled on that issue, and will not do so in the context of this frivolous facial challenge.* The Court's sole duty when presented with this facial challenge was to determine whether S.B. 60 could be constitutionally construed. In so doing, the Court interpreted the statute only to the extent necessary to make the constitutional determination.

In his Report and Recommendation, the magistrate judge followed the judicial policy of applying the least constitutionally offensive interpretation of the statute. Accordingly, his analysis was based on the assumption that S.B. 60 allows for telephonic communication. This Court, in response to plaintiffs' demand that the telephonic communication interpretation be adopted by the Court, analyzed the statute under both interpretations. The Court found that under either interpretation, S.B. 60 was facially valid. *See Leavitt I*, 844 F. Supp. at 1487-88. That decision stands. The state may now choose to enforce the statute as it sees fit.

D. Plaintiffs' Arguments Against the Award of Attorney's Fees

In opposing the Court's award of attorney's fees,

plaintiffs raise several arguments that merit further discussion.

1. The Court's Issuance of a Temporary Restraining Order

Plaintiffs submit that this Court cannot logically find plaintiffs' claims to be frivolous when it previously entered two temporary restraining orders ("TRO's") enjoining the state from enforcing S.B. 60.

The granting of a TRO, however, does not preclude a later finding of frivolousness. The standards governing the issuance of a TRO are quite different from the standards governing the ultimate resolution of the litigation.

A TRO is not based upon a true finding on the merits of the litigation. By its very nature, the TRO determination is made very early in the litigation -- before the court has time to engage in a thorough review of the law or facts. At such an early stage, the court's assessment of the merits is based primarily upon the parties' proffer of evidence. The court focuses on the potential injury that will occur if the TRO is not granted. A meaningful determination of the merits is not possible at that time.[27]

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[27]In this respect, the TRO contrasts with the preliminary injunction. The TRO expires after ten days. One purpose of this temporary injunction is simply to give the court more time to study the issue. The merits of the litigation, which cannot be easily determined at this early stage, play a lesser role in the court's determination.

A preliminary injunction, on the other hand, lasts until the ultimate finding on the merits is made. That determination is not made until the court has had sufficient time to review the relevant factual and legal issues. The court's assessment of the merits of the litigation is much more important to that determination.

(continued...)

Where plaintiffs came into court immediately prior to the effective date of a new statute, buried the Court with paper, and loudly declared that the statute would work irreparable harm to the rights of women in Utah, the Court was inclined to temporarily preserve the status quo by issuing a TRO. Such action, however, did not bind the Court in making subsequent evaluations on the merits of the litigation.[28]

In the instant case, plaintiffs declared from the outset that S.B. 60, on its face, violated the undue burden standard and that they could prove it. Based upon this proffer, and out of an abundance of caution and concern for the potential injury to the plaintiffs, the Court granted two ten-day restraining orders. When given time for a full review of the factual and legal record, however, the Court determined that plaintiffs' proffer was legally and factually frivolous and that an award of attorneys fees was warranted.

This Court's award of attorney's fees is neither illogical nor inconsistent with its granting of the TRO. If the Court has erred in this litigation, the error was in granting the TRO in the first place.

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[27](...continued)

In the instant case, plaintiffs' own argument at the TRO hearing illustrates at least that plaintiffs understand this characteristic of the TRO. See, e.g., Transcript of Hearing before Magistrate Judge Ronald N. Boyce, dated April 30, 1993, at 6 ("In essence, we are asking the Court to preserve the status quo. We are not asking the Court to decide the merits of this case . . . ."). By contrast, in considering the present motion the Court has the benefit of full exposure to the merits of the case -- or, rather, the lack thereof.

[28]Cf. Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993) (finding frivolousness despite fact that plaintiffs survived defendants' motions for dismissal and for summary judgment).

Plaintiffs' early successes in this litigation illustrate the benefits which can be achieved through abusive litigation tactics. Notwithstanding the fact that plaintiffs had no valid legal claim, they were able to obtain two TRO's and to delay enforcement of the Utah statute for approximately nine months. Such results underscore the need to award attorney's fees in cases like this one. Fee shifting is necessary to offset the benefits obtained through frivolous litigation. Thus, the Court's granting of the TRO's, rather than saving plaintiffs from an award of attorney's fees, actually works to confirm the need for such an award.

2. Subsequent Legal Authority

Plaintiffs cite to various legal authorities issued subsequent to *Casey*, from both the United States Supreme Court and lower federal courts, as support for their arguments against the award of attorney's fees in this case.

a. Supreme Court Authority

First, plaintiffs submit that this Court's finding of frivolousness conflicts with the opinion of Justice Souter in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 114 S. Ct. 909 (1994) (Souter, J., in chambers), and of Justice O'Connor in *Fargo Women's Health Organization v. Schafer*, 113 S. Ct. 1668 (1993) (mem.) (O'Connor, J., concurring in denial of stay). In those cases, the justices explained that *Casey* allows for subsequent facial challenges to similar abortion restrictions in other jurisdictions, and that courts must make an individualized assessment of each restriction under the undue burden standard.

Contrary to plaintiffs' assertions, the analysis used by the Court in this litigation is entirely consistent with the analysis of Justices O'Connor and Souter. In applying the

law in the instant case, this Court has followed the justices' approach with exactness.[29]

Plaintiffs have apparently misunderstood this Court's Opinion and Order. This Court has never ruled that "laws mandating delay prior to an abortion cannot in good faith be challenged on their face after [*Casey*]." Plaintiffs' Mem. Sup. Motion to Alter/Amend at 5. This Court has acknowledged that *Casey* did not create a *per se* prohibition of subsequent abortion litigation and that it requires an individualized factual assessment for each subsequent facial challenge. *See Leavitt I*, 844 F. Supp. at 1490.[30]

Plaintiffs in this litigation were given everything to which they were entitled.[31] They were allowed to bring a facial challenge to the statute. They were allowed to create a full factual record. They were given a trial on the merits. The Court reviewed plaintiffs' factual record in light of *Casey*'s undue burden standard to determine whether it was constitutional in the large fraction of relevant cases. It cannot be said that plaintiffs were denied an individualized assessment of their claims under the undue burden standard. To the contrary, plaintiffs "were given broad latitude to

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[29]See supra note 19 and accompanying text.

[30]The fact that Casey did not prohibit subsequent challenges in other jurisdictions, however, does not mean that all such challenges are necessarily well-grounded. The granting of an individualized assessment does not preclude a subsequent finding of legal frivolousness any more than does the granting of a TRO. Where a plaintiff has no evidence to support a finding of undue burden, it cannot reasonably bring a facial challenge. To the extent plaintiffs interpret the justices' opinions to suggest all challenges to Casey-type statutes are necessarily nonfrivolous, this Court rejects such a position.

[31]See supra note 19.

introduce evidence, call witnesses, and elicit testimony about the potential effects of the challenged provisions on the reproductive freedom of women, as were the plaintiffs in *Casey*. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 114 S. Ct. at 911-12 (Souter, J., in chambers).

Furthermore, plaintiffs were given an additional advantage the *Casey* plaintiffs never had. The *Casey* plaintiffs prepared their factual record anticipating application of the "strict scrutiny" test then in effect. *See id.* at 911. The Supreme Court itself applied the new undue burden test to *Casey*'s factual record in upholding the constitutionality of the Pennsylvania statute's core provisions when it first announced the test. *Id.* The *Casey* plaintiffs were subsequently denied an opportunity to fashion a record knowing precisely the standard that would ultimately be applied. *Id.*

The plaintiffs in the instant case, on the other hand, had the benefit of the clear standard enunciated in *Casey* as applied *by the United States Supreme Court*. Thus, they had every opportunity to develop a factual record that would challenge the Utah provisions. Both the magistrate judge and this Court recognized the fact that-the record in this case falls far short of the drastic factual findings entered in *Casey I* and reviewed by the United States Supreme Court.

The Court's finding of frivolousness in the instant case was made after an individualized review of plaintiffs' factual record. *See Leavitt I*, 844 F. Supp. at 1490-91. It was based upon the utter lack of evidence to support plaintiffs' claims. The Court held that because plaintiffs had no material evidence to show that S.B. 60 would impose an undue burden in Utah, the lawsuit was frivolous.

Accordingly, the individual opinions of the Supreme Court justices in no way support plaintiffs' arguments. Rather, they support the opposite conclusion. Plaintiffs should have known based on their own facts that their challenge to S.B. 60 was frivolous.

b. Lower Court Authority

Plaintiffs next cite to the actions of other federal courts to support their position. Plaintiffs point to the fact that other federal courts have issued temporary injunctions restraining enforcement of *Casey*-type statutes. *See* Plaintiffs' Mem. Sup. Motion to Alter/Amend at 9. For reasons stated in Part III.D.1 above, the Court finds this argument wholly unpersuasive.

Next, plaintiffs cite to the opinion of the Eighth Circuit in *Fargo Women's Health Organization v. Schafer*, 18 F.3d 526 (8th Cir. 1994). There, the court upheld North Dakota's 24-hour waiting period against a facial challenge. Plaintiffs point out, however, that the *Fargo* court did not find the facial challenge to be frivolous. Furthermore, the Eighth Circuit interpreted the North Dakota statute to allow for telephonic communication and specifically left open the question whether a two-visit requirement would be constitutional.

Fargo does nothing to support plaintiffs position in this case. The fact that a different court, in assessing an entirely different factual record, did not find the case to be frivolous is irrelevant to the determination of frivolousness in this litigation.[32]

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[32]See Planned Parenthood of Southeastern Pennsylvania v. Casey, 114 S. Ct. 909, 910-11 (1994) (Souter, J., in chambers); Fargo Women's (continued...)

Furthermore, the Eighth Circuit's employment of the telephonic communication interpretation is insignificant. As already explained in this Memorandum Decision, a court's consideration of a given plausible interpretation in the facial challenge context is nothing more than a recognition that the statute is capable of such an interpretation. Courts merely follow the judicial policy of giving the statute its least offensive interpretation. The court's interpretation in addressing a facial challenge is not binding upon the parties. A state is in no way obligated to follow the court's interpretation, made exclusively for facial challenge purposes, when applying and enforcing the statute. This is as true in the Eighth Circuit as it is in the Tenth.

Thus, there is nothing about the opinions of other lower federal courts that is inconsistent with this Court's finding of frivolousness. Rather, those cases are fully harmonious with this Court's individualized approach.

3. "Conflicts" with the Magistrate Judge

Plaintiffs also submit that the Court's finding of frivolousness is in "conflict" with the comments and questions raised by the magistrate judge at oral argument, as well as the Report and Recommendation submitted to the Court. The Court finds, however, that there is no conflict between the findings of the magistrate judge and this Court's award of attorney's fees.

Comments and questions posed by the magistrate judge at oral argument do not represent the findings of the Court. Here, the findings of the magistrate judge are contained in

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[32](...continued)
Health Organization v. Schafer, 113 S. Ct. 1668, 1669 (1993) (mem.) (O'Connor, J., concurring in denial of stay).

his written Report and Recommendation. The magistrate judge was not asked to determine the issue of frivolousness. His sole duty was to examine the factual evidence and determine whether S.B. 60 was facially valid. The magistrate judge performed this task in an impressive and conscientious fashion.[33] After giving plaintiffs' claims a thorough and detailed treatment, the magistrate judge found plaintiffs' suit to be without merit and recommended the dismissal of plaintiffs' entire case.

The issue of frivolousness was neither presented to nor discussed by the magistrate judge. Furthermore, the extent of plaintiffs' frivolousness was not readily apparent in the early stages of the litigation. It was not until plaintiffs filed their "objections" to the Report and Recommendation that the full extent of plaintiffs' abusive tactics became apparent to the Court.

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[33]Indeed, plaintiffs argue that the sheer length of the Report and Recommendation precludes a finding of frivolousness. See Plaintiffs' Mem. Sup. Motion to Alter/Amend at 5 n.4. The Court finds this argument unpersuasive. A "thickness test" is not an effective tool in evaluating a case for frivolousness; the merit of a legal claim does not necessarily correspond to the thickness of the parties' briefs or the court's opinions.

Here, a substantial portion of the Report and Recommendation is devoted to a review of plaintiffs' lengthy factual record. In a case where the plaintiffs raise numerous legal arguments and submit a voluminous amount of evidence, a lengthy and detailed treatment of the issues might be necessary. This does not preclude a finding of frivolousness, however, if the court determines that the arguments are without foundation.

To the contrary, the submission of massive amounts of argument and evidence has the potential to be used as an abusive litigation tactic -- to overwhelm one's opponent and the court with the sheer bulk of submissions. In such a case, the length of the magistrate judge's memorandum supports, rather than detracts from, the Court's decision to award attorney's fees.

Under federal law, this Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1) (1994). The magistrate judge's involvement in the case was for the benefit of the Court. As noted, he dispatched his responsibilities with remarkable competency. Nevertheless, his findings in no way preclude a final determination by this Court on the merits of the case.[34]

In sum, the magistrate judge made no findings which would preclude a finding of frivolousness in this case. Even if he had, however, the Court finds on its own review that plaintiffs case is frivolous in its entirety.

4. The "Benefits of this Lawsuit

Plaintiffs argue that this lawsuit is not frivolous because it has resulted in "benefits" to some of the members of plaintiffs' class. In that regard, plaintiffs have submitted additional evidence concerning the benefits allegedly obtained from this litigation. Specifically, plaintiffs allege that "as a result of this lawsuit, the plaintiff health providers will be able to provide the mandated information by telephone." Plaintiffs' Mem. Sup. Motion to Alter/ Amend at 9. They further allege that this lawsuit has resulted in improved written materials and books prepared by the state. *Id.* at 9-10. The obtaining of such benefits, plaintiffs argue, precludes a finding of frivolous.

This argument is perhaps the most offensive of all the

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[34]The plaintiffs' arguments about the Court's "conflicts" with the magistrate judge show a fundamental misunderstanding, real or contrived, of the role assigned the magistrate judge under federal law. By now, such disregard for straightforward, applicable law is a familiar motif in this litigation.

arguments raised by plaintiffs in the course of this litigation.

The "benefits" named by plaintiffs are not related to the real merits of this lawsuit and are not properly won through litigation. First, as explained in Part III.C of this decision, this Court has properly refused to make a binding determination on the issue of telephonic communication. The constitutionality of S.B. 60 is not dependent upon this issue, and courts make no binding statutory interpretations in the context of a facial challenge. Simply stated, nothing in this Court's Opinion and Order and nothing in the magistrate judge's Report and Recommendation compels the state to allow that the required information be given by telephone.

Similarly, the legal merits of this lawsuit are in no way dependent upon the state's written materials. That issue was irrelevant to the facial validity of S.B. 60. The state's materials are clearly subject only to an "as-applied" challenge when, and if, they are actually used by the state.

No doubt, plaintiffs have obtained many benefits from this lawsuit. In addition to the above-named "benefits,' plaintiffs gained a large amount of publicity, cost the state tens of thousands of dollars in litigation expenses, and obtained a nine-month delay in the enforcement of the statute.[35] These are not, however, the kinds of benefits properly won through meritless litigation; they are tainted by the manner in which they were extorted.[36]

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[35]See supra note 23.

[36]The Court stresses that there is nothing wrong with attempting to alter state law or policy to benefit one's political, social, or economic position. Benefits won through persuasion, compromise, negotiation, or (continued...)

This case offers a classic example of abusive litigation. Rather than distancing themselves from abusive practices, plaintiffs actually seem to revel in them. Despite the fact that plaintiffs lost in all aspects on the legal merits of this lawsuit, plaintiffs have openly declared themselves the victors in this litigation -based solely on their extorted "benefits." Plaintiffs even have the audacity to declare themselves the "prevailing party" and submit that they intend to seek attorney's fees from the state. *See* Plaintiffs' Mem. Sup. Motion to Alter/Amend at 10 n.7. Never has this Court witnessed such unmitigated effrontery.

5. The Deterrent Effect of Attorney's Fee Awards

Finally, plaintiffs argue that the Court's award of attorney's fees is improper because it will deter other individuals from pursuing civil rights legislation when their constitutional rights are threatened. *See* Plaintiffs' Mem. Sup. Motion to Alter/Amend at 10.

It is the Court's sincere hope that its award of attorney's fees will have a deterrent effect. This is one of the main purposes for assessing such an award -- to deter frivolous litigation. Section 1988 allows the Court to award fees to prevailing defendants in frivolous litigation in order to prevent plaintiffs from abusing the civil rights laws to gain unwarranted advantages. "When a court imposes fees on a plaintiff who has pressed a 'frivolous' claim, it chills nothing that is worth encouraging." *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993).

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[36](...continued)
legislation are perfectly acceptable. Benefits won through adjudication of a legitimate case or controversy are proper. Benefits extorted through the use of meritless litigation, in contrast, are an abuse of the judicial system and cannot be tolerated.

On the other hand, Section 1988 does nothing to deter legitimate plaintiffs whose claims are meritorious -- or at least arguably meritorious. If a plaintiff has a legitimate, nonfrivolous basis for civil rights litigation, Section 1988 actually encourages such a claim. Prevailing plaintiffs are awarded fees almost as a matter of course. *See, e.g., Jane L. IV*, 828 F. Supp. at 1547 (awarding fees to prevailing parties in abortion legislation litigation). Losing plaintiffs, on the other hand, are not assessed fees unless their claims are found to be groundless and frivolous. Thus, parties with legitimate civil rights disputes have no need to fear an award of attorney's fees and should not be deterred by the Court's assessment of fees. *See Hutchinson v. Staton*, 994 F.2d at 1081.

If the Court's award of fees in this case deters these or other plaintiffs from improperly trying to win in federal court what they were unable to obtain from the legislature, it has served its purpose.

IV. SUMMARY AND CONCLUSION

Where legitimate constitutional issues are at stake, the adjudication of abortion rights -- or any rights -- can, and should, properly be accomplished in the judicial branch. Where there are no valid legal disputes, however, the issue should be confined to other arenas. Parties are free to zealously advocate their cause in the legislative, and executive branches of government and the private sector through education, persuasion, and debate. Parties who are unsuccessful in other arenas, however, should not resort to frivolous litigation in an attempt to obtain through the judicial branch what they were unable to obtain through other channels. Otherwise, a zealous, outspoken minority can improperly thwart the laws of the majority as enacted through their duly elected representatives.

Frivolous litigation can have a powerful impact on the other branches of government. A legal challenge to newly enacted legislation, no matter what the ultimate resolution of the matter, can have the effects of delaying enforcement of the statute, gaining publicity for a political cause, harassing the state by forcing it to engage in costly litigation, and discouraging the state (and other states) from enacting similar legislation.[37] Where the action is legally frivolous, none of these constitute a legitimate legal objective. Each constitutes an abuse of the legal process.

In the instant case, the plaintiffs' subjective intent in filing suit is irrelevant to the Court's finding of frivolousness.[38] Regardless why plaintiffs filed suit, their actions exhibit only objectively nonlegitimate, abusive efforts. Most, if not all, of the abuses generally associated with frivolous litigation have occurred in the present case.

Where the Court finds that a lawsuit is wholly without foundation it should make an award of attorney's fees to the defendants. Such an award will, in a small way, help to offset the consequences of the plaintiffs' unreasonable efforts.

The requirement of nonfrivolous litigation does not close the courthouse door, but it does prevent parties from misusing the judicial branch to unfairly affect the legislative branch, the executive branch, or other citizens. All plaintiffs with valid claims are welcome in the courts of the United States. The plaintiffs in the instant case are not barred from litigating future claims. The courts impose this one simple

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[37] See supra note 23.

[38] See Hughes v. Rowe, 449 U.S. 5, 14 (1980); supra note 7 and accompanying text.

requirement on them: they are not allowed to bring frivolous litigation. If they do, they are subject to paying their opponents' attorney's fees and costs.

In light of *Casey*'s legal and factual precedent, no party armed with the plaintiffs' facts could have reasonably expected to prevail on the merits of this lawsuit. Accordingly, this Court has ruled, and hereby confirms on reconsideration, that an award of attorney's fees is warranted in this case. Therefore,

The Court DENIES Plaintiffs' Motion to Alter or Amend Judgment to Rescind Award of Attorneys' Fees.

The Court has reviewed the parties memoranda and affidavits relating to the amount of the attorney's fees at stake. For good cause shown, the Court GRANTS Defendants' Motion to Set Amount of Attorney Fee Award and Award Costs, in the amount of $72,930.00 for attorney's fees, with costs of $477.40.[39]

Because this litigation should never have been brought, and because of the additional frivolous arguments raised in plaintiffs fee memoranda, the Court further ORDERS that plaintiffs be assessed the additional attorney's fees incurred by the state in defending against the plaintiffs present motion and in bringing the state's own motion to set the fee award. The defendants have 20 days from the date of this Memorandum Decision and Order in which to file an

[39]Defendants filed a bill of costs on February 22, 1994, asking the Court for a cost award of $481.40. The clerk of court made a minor reduction for the delivery costs of one transcript, a charge not taxable under 28 U.S.C. § 1920.

appropriate fee affidavit.[40]

The Court DENIES Plaintiffs' Alternative Motion to Certify Interlocutory Appeal.

IT IS SO ORDERED.

DATED this 20th day of June, 1994.

/s/
Dee Benson
United States District Judge

[40]The fee affidavit should include reasonable time spent in its preparation.

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

----------X

UTAH WOMEN'S CLINIC, INC.;
EDWARD R. WATSON, M.D.;
MADHURI SHAH, M.D.;
LAUREL SHEPHERD, M.D.;
ALISSA PORTER; WENDY
EDWARDS; WASATCH
WOMEN'S CENTER, P.C.;
WILLIAM R. ADAMS, M.D.;
DENISE DEFA; and SARAH
ROE, on behalf of herself
and all other similarly
situated women from Utah
and surrounding states,

Plaintiffs,

vs.

MICHAEL LEAVITT, Governor
of the State of Utah,
in his individual and official
capacities; JAN GRAHAM,
Attorney General of Utah, in her

CIVIL ACTION
NO. 93-C-407B

individual and official
capacities; and their successors

Defendants.

----------X

NOTICE OF APPEAL

Notice is hereby given that Utah Women's Clinic, Inc.; Edward R. Watson, M.D.; Madhuri Shah, M.D.; Laurel Shepherd, M.D.; Alissa Porter; Wendy Edwards; Wasatch Women's Center, P.C.; William R. Adams, M.D.; Denise Defa; and Sarah Roe, on behalf of herself and all other similarly situated women from Utah and surrounding states, plaintiffs in the above named case, hereby appeal to the United States Court of Appeals for the Tenth Circuit from the Opinion and Order entered in this action on February 1, 1994, from the Judgment entered in this action on February 3, 1994, and from the Memorandum Decision and Order entered in this action on June 22, 1994.

Dated: July 15, 1994

Respectfully submitted,

/s/

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF UTAH

UTAH WOMEN'S CLINIC, INC., et al. Plaintiffs, v.	JUDGMENT IN A CIVIL CASE FOR ATTORNEY FEES
MICHAEL LEAVITT, et al. Defendants.	CASE NUMBER: 93-C-407B

__ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX Decision by Court. This action came to trial or hearing before the Court The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment be entered in favor of the defendants against the plaintiffs for attorney fees in the amount of $81,477.50 and costs of $477.40 pursuant to the memorandum decision of the court of June 20, 1994 and the order of the court of July 11, 1994.

July 15, 1994
Date

Markus B. Zimmer
Clerk

/s/ Louise Salter York
(By) Deputy Clerk

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

----------X

UTAH WOMEN'S CLINIC, INC.; EDWARD R. WATSON, M.D.; MADHURI SHAH, M.D.; LAUREL SHEPHERD, M.D.; ALISSA PORTER; WENDY EDWARDS; WASATCH WOMEN'S CENTER, P.C.; WILLIAM R. ADAMS, M.D.; DENISE DEFA; and SARAH ROE, on behalf of herself and all other similarly situated women from Utah and surrounding states,

Plaintiffs,

CIVIL ACTION
NO. 93-C-407B

vs.

MICHAEL LEAVITT, Governor of the State of Utah, in his individual and official capacities; JAN GRAHAM, Attorney General of Utah, in her

individual and official
capacities; and their successors

Defendants.
----------X

AMENDED NOTICE OF APPEAL

Notice is hereby given that Utah Women's Clinic, Inc.; Edward R. Watson, M.D.; Madhuri Shah, M.D.; Laurel Shepherd, M.D.; Alissa Porter; Wendy Edwards; Wasatch Women's Center, P.C.; William R. Adams, M.D.; Denise Defa; and Sarah Roe, on behalf of herself and all other similarly situated women from Utah and surrounding states, plaintiffs in the above named case, hereby appeal to the United States Court of Appeals for the Tenth Circuit from the Opinion and Order entered in this action on February 1, 1994, from the Judgment entered in this action on February 3, 1994, from the Memorandum Decision and Order entered in this action on June 22, 1994, and from the Judgment in a Civil Case for Attorney Fees entered in this action on July 15, 1994.

Dated: July 20, 1994

Respectfully submitted,

/s/

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UTAH WOMEN'S CLINIC, INC.; EDWARD R. WATSON, M.D.; MADHURI SHAH, M.D.; ALISSA PORTER; WENDY EDWARDS; WASATCH WOMEN'S CENTER, P.C.; WILLIAM R. ADAMS, M.D.; DENISE DEFA and SARAH ROE, on behalf of herself and all similarly situated women from Utah and surrounding states,

Plaintiffs-Appellants,

vs.

No. 94-4170
(D.C. No. 93-C-407B)
(D. Utah)

MICHAEL LEAVITT, Governor of the State of Utah, in his individual and official capacities; JAN GRAHAM, Attorney General of Utah, in her individual and official capacities; and their successors,

Defendants-Appellees.

ORDER AND JUDGMENT*

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*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estopped. The court generally disfavors the

(continued...)

Before TACHA, BALDOCK and KELLY, Circuit Judges.**

Plaintiffs appeal from the district court's adverse judgment on their constitutional challenge to various statutory provisions enacted in Utah regarding informed consent prior to an abortion. Aplt. App. 1110-13. The provisions were modeled after those upheld in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). They also appeal from the district court's judgment awarding costs and attorney's fees in favor of the Defendants. *Id.* We sought additional briefing on whether the notice of appeal was timely filed so as to preserve the merits appeal. We conclude that we do not have jurisdiction over the merits appeal, and remand the case for reconsideration of the propriety of awarding attorney's fees in light of subsequent authority.

Background

Plaintiffs challenged the constitutionality of the Utah Abortion Act Revision, S.B. No. 60; Aplt. App. 0182b-

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*(...continued)
citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order. 151 F.R.D. 470 (10th Cir. 1993).

**After examining the briefs and appellate record, this panel determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. Oral argument was vacated and we now order the cause submitted without oral argument.

0182j; codified at Utah Code Ann. §§ 76-7-301, 76-7-305 and 76-7-305.5 (Michie 1995 Repl.), as well as its interaction with Utah Code Ann. § 76-7-315 (Michie 1995 Repl.). On February 1, 1994, the district court entered an opinion and order denying relief on the merits and dismissing the action. *Utah Women's Clinic, Inc. v. Leavitt*, 844 F. Supp. 1482, 1486, 1495 (D. Utah 1994). In the last sentence of the opinion and order, the district court sua sponte ordered the Plaintiffs to pay Defendants costs and attorney's fees. Judgment reflecting the above was entered on February 4, 1994. Aplt. App. 1000.

Within ten days of the entry of final judgment, Plaintiffs served a Fed. R. Civ. P. 59(e) "Motion to Alter or Amend Judgment to Rescind Award of Attorneys' Fees Or, in the Alternative, to Certify Interlocutory Appeal." Aplt. App. 1001. Plaintiffs raised no issue concerning the merits or correctness of the district court's decision on the constitutionality of S.B. 60. Instead, they argued that the award of attorney's fees constituted an abuse of discretion. Plaintiffs also requested that if the district court did not delete the award of attorney's fees *and costs*, it should certify an interlocutory appeal of the issue pursuant to 28 U.S.C. § 1292(b) so that there might be a single appeal "of the fee issue along with the merits issues." Aplt. App. 1043. *See also Id.* at 1001, 1033.

In a memorandum decision and order entered June 21, 1994, the district court denied Plaintiffs' Rule 59(e) motion, set the amount of attorney's fees ($72,930) and costs ($477.40), and invited Defendants to seek additional fees for defending against the Rule 59(e) motion and establishing the fee award. Aplt. App. 1104. Judgment was entered in favor of Defendants for attorney's fees (now $81,477.50) and costs on July 15, 1995. *Id.* at 1109. The notice of appeal was filed on July 18, 1994. *Id.* at 1110.

On August 4, 1994, a jurisdictional panel raised the issue of whether the notice of appeal was timely filed as to the district court's February 1, 1994 opinion and order and subsequent judgment entered February 4, 1994. The parties responded and the jurisdictional issue was referred to the merits panel.

Discussion

A civil notice of appeal where the United States is not a party must be filed within thirty days after the date of entry of an order or judgment appealed from. Fed. R. App. P. 4(a)(1). A timely filed notice of appeal is an absolute prerequisite to our jurisdiction. *Browder v. Director, Dep't of Corrections*, 434 U.S. 957, 264 (1978). Normally, a timely filed Rule 59(e) motion tolls the thirty-day period until entry of an order disposing of the motion. Fed. R. App. P. 4(a)(4)(C). The jurisdictional issue in this case is whether the Rule 59(e) motion, which sought only "to delete the award of attorneys' fees and costs to defendants in this matter," Aplt. App. 1001, prior to the quantification of those fees and costs, tolled the time in which to take an appeal from the merits, i.e. the constitutionality of S.B. No. 60.

The Supreme Court has held that the question of attorney's fees and costs are collateral to and separate from a decision on the merits. *Buchanan v. Stanships, Inc.*, 485 U.S. 265, 267-68 (1988) (per curiam) (costs); *White v. New Hampshire*, 455 U.S. 445, 451-52 (1982) (attorney's fees). The Court adopted a "bright-line rule" holding "that an unresolved issue of attorney's fees for the litigation in question does not prevent the judgment on the merits from being final." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988). When a judgment on the merits has been rendered, the Court has declined to apply Rule 59(e) to requests for attorney's fees or costs based upon the

underlying merits judgment. *Buchanan*, 485 U.S. at 267-68 (costs); *White*, 455 U.S. at 451 (attorney's fees).

Plaintiffs argue that their Rule 59(e) motion tolled the time to appeal from the February decisions notwithstanding that it related "in part" to an award of attorney's fees. They claim that the finality of the merits judgment in this case is not really an issue because a Rule 59(e) motion was filed and the motion would require the district court to consider matters intertwined with the merits. Finally, they urge adoption of the rule in *Ramsey v. Colonial Life Ins. Co.*, 12 F.3d 472 (5th Cir. 1994) which held that "a motion to reconsider a judgment will be considered a Rule 59(e) motion even where the request for reconsideration encompasses only that part of the judgment regarding attorney's fees." *Id.* at 478. *See also Penland v. Warren County Jail*, 759 F.2d 524, 527 (6th Cir. 1985) (en banc).

Defendants recognize the above circuit authority, but contend that it is difficult to reconcile with the bright line rules established by the Supreme Court as well as other circuit authority. They raise *Collard v. United States*, 10 F.3d 718 (10th Cir. 1993), in which we held that an amendment to the judgment to award costs, like an amendment to award attorney's fees, is collateral and will not alter the finality of the original judgment. *See also Lentomyynti Oy v. Medivac, Inc.*, 997 F.2d 364, 368 (7th Cir. 1993) (Rule 68 motion for costs is not a Rule 59(e) motion because it raises collateral matters). Defendants decline to take a position on whether the court has jurisdiction over the merits appeal.

Plaintiffs' Rule 59(e) motion and memorandum could not be any clearer regarding the relief requested: deletion of the award of attorney's fees and costs before those fees and costs were settled in further proceedings. Aplt. App. 1001,

1033. Plaintiffs argue that their Rule 59(e) motion questioned the correctness of the February decisions insofar as attorney's fees are concerned; however, that does not change the fact that costs and attorney's fees normally are collateral to the merits judgment, particularly when the judgment contemplates significant further proceedings concerning costs and attorney's fees. Therefore, a Rule 59(e) motion, challenging only the award of costs and attorney's fees, does not toll the time for a merits appeal. The Supreme Court has created a uniform rule, regardless of the statutory or decisional law which authorizes the award and despite claims that fee matters are part of the merits. *Budinich*, 486 U.S. at 201-02. As a lower federal court, we are not free to disregard this uniform rule.

Osterneck v. Ernst & Whinney, 489 U.S. 169 (1989), relied upon by the Plaintiffs, is not to the contrary. There the Court reaffirmed that a Rule 59(e) motion pertains to "'reconsideration of matters properly encompassed in a decision on the merits.'" *Id.* at 174-75 (quoting *White*, 455 U.S. at 451-52). In ruling that prejudgment interest could be considered under Rule 59(e) the Court explained:

> [U]nlike attorney's fees, which at common law were regarded as an element of costs and therefore not part of the merits judgment, *see Budinich*, [486 U.S.] at 200-201, prejudgment interest traditionally has been considered part of the compensation due plaintiff.
>
> [U]nlike a request for attorney's fees or a motion for costs, a motion for discretionary prejudgment interest does not "rais[e] issues wholly collateral to the judgment in the main cause of action," *Buchanan*, [485 U.S.] at 268; see *White*, 455 U.S., at 451, nor does it require an inquiry wholly "separate from the decision on the merits,"

> *id.*, at 451-52.

Osterneck, 489 U.S. at 175-76. The contention that "there is no question that plaintiffs' [Rule 59(e)] motion was like the one in *Osterneck*," Aplt. Br. on Jurisdiction at 19, is not persuasive.

The district court issued a lengthy opinion and order on the merits, and without analysis ordered Plaintiffs to pay costs and attorney's fees. Regarding costs and attorney's fees, the February orders were interlocutory -- they established fee liability, but not the fee amount. *See, e.g., Echols v. Parker*, 909 F.2d 795, 798 (5th Cir. 1990). Without question, further proceedings on the attorney's fees and costs were inevitable, if only to quantify them.

We think that the Plaintiffs recognized that matters pertaining to attorney's fees and costs not only were separate, but also would require further proceedings and a separate appeal. The Rule 59(e) motion did not challenge the merits judgment, but rather advised that the merits issues would be appealed. Aplt. App. 1043. Plaintiffs sought certification of the attorney's fees issue so that there would be a single appeal. *Id.* ("this Court should certify the appeal and give the Court of Appeals the option of hearing the fee appeal and the merits appeal together").

Plaintiffs urge us to follow *Ramsey v. Colonial Life Ins. Co.*, 12 F.3d 472, 476-78 (5th Cir. 1994). We do not think that *Ramsey* was meant to apply where the Rule 59(e) motion is directed to a merits judgment *awarding* both attorney's fees and costs which will be quantified at some future date. *Ramsey* pertains to a Rule 59(e) motion where the judgment was final not only as to the merits, but also as to attorney's fees. 12 F.3d at 473-4. Unlike this case, the judgment incorporating the denial of attorney's fees

contemplated no further proceedings. Here, the Rule 59(e) motion questioned *liability* for attorney's fees and costs which had not been set, significant further proceedings were essential on these collateral matters, and Plaintiffs apparently recognized the collateral nature of these issues when they sought to take a separate appeal.

Ramsey relied upon and reaffirmed *Campbell v. Bowlin*, 724 F.2d 484 (5th Cir. 1984), which is more analogous to this case. In *Campbell*, the judgment on the merits also included a fee award in favor of defendants. Defendants then filed a Rule 59(e) motion seeking supplemental fees. The Fifth Circuit rejected the notion that because the initial judgment awarded fees, a request for modification of that judgment as to fees was cognizable under Rule 59(e).

> [*White* and *Knighton v. Watkins*, 616 F.2d 795 (5th Cir. 1980)] clearly establish that the question of attorneys' fees is a collateral issue. If an award of attorneys' fees is collateral to the judgment on the merits, then the time at which they are awarded is immaterial; whether awarded at the same time judgment is entered or four months later, they are still collateral to the main cause of action. Therefore, even if defendants' post-judgment motion could be seen as altering the original award of attorneys' fees, that would not prevent [plaintiff] Campbell from proceeding with an appeal of the judgment on the merits.

Campbell, 724 F.2d at 488. This rationale does not contemplate a different result if, instead of the defendants, the plaintiff had sought to alter the original award of attorney's fees to defendants. The merits judgment was final and appealable. Regardless of which side prevails, civil rights actions invariably spawn disputes over attorney's fees;

these disputes should not delay the appeal of the merits.

Plaintiffs contend that we have addressed this issue in *Diaz v. Romer*, 961 F.2d 1508 (10th Cir. 1992). The discussion in *Diaz*, however, merely states that a timely filed Rule 59(e) motion tolls the time for appeal for all parties (not just the movants) and does not consider the collateral nature of attorney's fees and costs. 961 F.2d at 1510. It is not dispositive here.

Plaintiffs also cite to *Varnes v. Local 91, Glass Bottle Blowers Ass'n*, 674 F.2d 1365, 1368-69 (11th Cir. 1982), to support their contention that the Eleventh Circuit has held that attorney's fee awards are not collateral when the basis for the award is the other side's bad faith. *Varnes* qualified Plaintiffs' contention by acknowledging it only would apply when the award was equitable, not statutory. *Id.* at 1369. In this case, the attorney's fees were awarded pursuant to 42 U.S.C. § 1988, as the Plaintiffs well know. Aplt. App. 1042, 1051.

Although we lack jurisdiction over the merits, we do have jurisdiction over the attorney's fees issue raised on appeal. The district court awarded the Defendants attorney's fees and costs after a trial on the merits, *Utah Women's Clinic*, 844 F. Supp. at 1495; Fed. R. Civ. P. 65(a)(2). On appeal, Plaintiffs challenge the award of attorney's fees. Aplt. Br. at 32. During the pendency of this appeal, the Tenth Circuit reversed the judgment in *Jane L. v. Bangerter*, 828 F. Supp. 1544 (D. Utah 1993), a case relied upon by the district court. *See* Aplt. App. 1052-53. *Jane L. v. Bangerter*, 61 F.3d 1505, 1513-18 (10th Cir. 1995). In light of the principles discussed in *Jane L.*, we remand the case to the district court for reconsideration of the attorney's fees issue.

Finally, Plaintiffs request that if the case is remanded, it be assigned to a different district judge. This request will be denied with no expression of opinion; to the extent that Plaintiffs wish to pursue this on remand they may file an appropriate motion in the district court.

APPEAL DISMISSED in part; JUDGMENT REVERSED in part and remanded.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UTAH WOMEN'S CLINIC, INC.; EDWARD R. WATSON, M.D.; MADHURI SHAH, M.D.; ALISSA PORTER; WENDY EDWARDS; WASATCH WOMEN'S CENTER, P.C.; WILLIAM R. ADAMS, M.D.; DENISE DEFA and SARAH ROE, on behalf of herself and all similarly situated women from Utah and surrounding states,

Plaintiffs-Appellants,

No. 94-4170

vs.

MICHAEL LEAVITT, Governor of the State of Utah, in his individual and official capacities; JAN GRAHAM, Attorney General of Utah, in her individual and official capacities; and their successors,

Defendants-Appellees.

ORDER
Entered January 25, 1996

Before TACHA, BALDOCK and KELLY, Circuit Judges.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en bane was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

By: /s/ L. Balzano
Deputy Clerk

(2)

No. 95-1767

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

UTAH WOMEN'S CLINIC, INC.; EDWARD R. WATSON, M.D.; MADHURI SHAH, M.D.; LAUREL SHEPHERD, M.D.; ALISSA PORTER; WENDY EDWARDS; WASATCH WOMEN'S CENTER, P.C.; WILLIAM R. ADAMS, M.D.; DENISE DEFA; and SARAH ROE, on behalf of herself and all other similarly situated women from Utah and surrounding states,

Petitioners,

v.

MICHAEL LEAVITT, Governor of the State of Utah, in his individual and official capacities; JAN GRAHAM, Attorney General of the State of Utah, in her individual and official capacities; and their successors,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is the time to appeal a final judgment on the merits tolled by a motion for reconsideration of an interlocutory order finding liability for attorney fees and costs, but not establishing the amounts to be awarded?

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No. 95-1767

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

UTAH WOMEN'S CLINIC, et al., Petitioners,

v.

MICHAEL LEAVITT, et al., Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF IN OPPOSITION

Governor Michael Leavitt and Attorney General Jan Graham respectfully request that this Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

STATEMENT OF THE CASE

Plaintiffs brought this action challenging the Utah Abortion Act Revision, S. B. No. 60. Judge Benson entered his opinion and order dismissing the action on February 3, 1994. In the last sentence of this opinion and order, the trial court also found the plaintiffs to be liable for the defendants' attorney fees under 42 U.S.C. § 1988. While the opinion and order was final as to the dismissal of the plaintiffs' action on

the merits, it was only interlocutory as to the collateral issue of the defendants' costs and attorney fees. The amount of costs and attorney fees to be awarded was not decided.

Judgment was entered for the defendants, dismissing this action on the merits on February 3, 1994. On February 14, 1994, the plaintiffs filed a motion asking the trial court to reconsider its decision imposing liability on the plaintiffs for the defendants' attorney fees. This motion was styled a motion to alter or amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. The motion did not challenge the district court's decision on the merits of the action in any manner. The only issue addressed in the motion was the collateral issue of attorney fees.

The plaintiffs' motion was denied by the trial court and a judgment on the attorney fees question was entered on July 15, 1994. The plaintiffs' notice of appeal was filed on July 18, 1994, seeking to challenge the February 3, 1994 judgment on the merits and the trial court's award of attorney fees. An amended notice of appeal was filed by the plaintiffs on July 22, 1994 to include the judgment for attorney fees in the appeal.

The United States Court of Appeals for the Tenth Circuit held that a motion to delete a trial court's award of costs and attorney fees did not toll the time period for appealing the merits of the underlying case. *Utah Women's Clinic, Inc. v. Leavitt*, 75 F.3d 564 (10th Cir. 1995).

REASONS FOR DENYING THE PETITION

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FOLLOWED THIS COURT'S CONTROLLING PRECEDENT AND ITS DECISION DOES NOT CONFLICT WITH DECISIONS OF THE OTHER COURTS OF APPEAL

The United States Court of Appeals for the Tenth Circuit dismissed as untimely that portion of the plaintiffs' appeal that sought to review the trial court's decision to dismiss the plaintiffs' complaint on the merits. The court correctly determined that the ongoing litigation over whether the defendants were entitled to recover their attorney fees and costs did not preclude the judgment entered on the merits from being final. Because the plaintiffs did not file a timely notice of appeal from the dismissal of their action on the merits, the United States Court of Appeals for the Tenth Circuit correctly dismissed that portion of the appeal on the grounds that the court was without jurisdiction to consider it.

In their petition for a writ of certiorari, plaintiffs erroneously treat the final judgment on the merits as being a final judgment on the question of attorney fees and costs as well. Final judgment on the merits of this action was entered in favor of the defendants on February 4, 1994. That judgment stated:

> that judgment be entered in favor of the defendants and the plaintiffs' cause of action is dismissed with prejudice. Because of the absence of merit in support of plaintiffs' case and the legal frivolousness of plaintiffs'

> assertions in this facial challenge, plaintiffs are ordered to pay defendants' costs and attorneys fees.

While this judgment was final as to the merits, the decision as to the defendants' costs and attorney fees was not. The amount of costs and attorney fees to be awarded was still to be determined.

In *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988), this Court explained that a final decision for jurisdiction purposes pursuant to 28 U.S.C. § 1291 "generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." (Quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). Even a short glance at the challenged judgment demonstrates that it is not a final order as to attorney fees.

Plaintiffs' Fed. R. Civ. P. 59(e) motion to alter or amend the judgment did not challenge the final judgment as to the merits, but only asked the trial court to reconsider its interlocutory order regarding fees and costs. This motion did not effect the finality of the trial court's final judgment on the merits.

The United States Court of Appeals for the Tenth Circuit correctly followed the decisions of this Court that have stated that an outstanding question of attorney fees and costs under section 1988, or otherwise, is a collateral issue and does not bar recognition of a merits judgment as being final and appealable. *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175-76 (1989); *Budinich*, 486 U.S. at 202-3; *Buchanan v. Stanships, Inc.*, 485 U.S. 1130, 1131-32 (1988);

White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 451-53 (1982); *Browder v. Director, Illinois Dep't of Corrections*, 434 U.S. 257 (1978).

This Court has adopted a "bright-line rule" holding "that an unresolved issue of attorney's fees for the litigation in question does not prevent the judgment on the merits from being final." *Budinich*, 486 U.S. at 202. This Court has repeatedly considered the issue of attorney fees and costs to be collateral to the main cause of action. *Osterneck*, 489 U.S. at 175-76; *Budinich*, 486 U.S. at 199-201; *Buchanan*, 485 U.S. 268-69; *White*, 455 U.S. at 450-51; *Browder*, 434 U.S. at 451.

The United States Court of Appeals for the Tenth Circuit correctly applied these precedents to the facts of the present action.

> Plaintiffs' Rule 59(e) motion and memorandum could not be any clearer regarding the relief requested: deletion of the award of attorney's fees and costs before those fees and costs were settled in further proceedings. Aplt. App. 1001, 1033.

Plaintiffs argue that their Rule 59(e) motion questioned the correctness of the February decisions insofar as attorney's fees are concerned; however, that does not change the fact that costs and attorney's fees normally are collateral to the merits judgment, particularly when the judgment contemplates significant further proceedings concerning costs and attorney's fees. Therefore, a Rule 59(e)

> motion, challenging only the award of costs and attorney's fees, does not toll the time for a merits appeal. The Supreme Court has created a uniform rule; regardless of the statutory or decisional law which authorizes the award and despite claims that fee matters are part of the merits. *Budinich*, 486 U.S. at 201-02. As a lower federal court, we are not free to disregard this uniform rule.

Utah Women's Clinic, Inc., v. Leavitt, 75 F.3d 564, 567 (10th Cir. 1995).

The United States Court of Appeals for the Tenth Circuit correctly pointed out that the plaintiffs' motion did not ask the trial court to reconsider its decision to dismiss their action. The only claim raised by the plaintiffs was their belief that the defendants should not be awarded fees and costs in this matter. But attorney fees and costs are collateral legal issues to which Rule 59(e) was never meant to apply. White, 455 U.S. at 451.

Plaintiffs err in stating that the challenged decision is in conflict with the prior decisions of this Court. This court has repeatedly held that questions of attorney fees and costs are collateral in nature. The decision of the United States Court of Appeals for the Tenth Circuit expressly follows the law established by this Court. Indeed, the rule of law that the plaintiffs urge this Court to accept would be contrary to the prior decisions of this Court. This Court has sought to create a "bright-line" test in this area as to what decisions are final and appealable. But in this action, while the decision on the merits was final, the decision on the question of attorney fees

was only interlocutory. The amount of fees and costs to be awarded had yet to be determined. To accept the position of the plaintiffs would be to state that the ongoing litigation on the collateral issue of fees and costs was capable of stopping the judgment on the merits from being final. This result would directly conflict with the result urged by this Court and would lead to results in direct conflict with the "bright-line" test this Court has sought to establish.

Plaintiffs claim that the decision of the United States Court of Appeals for the Tenth Circuit is contrary to the decisions of this Court is based, in part, on their theory that those decisions apply only to original motions for fees and costs, and not to ongoing litigation on such matters. This limitation, urged by the plaintiffs, is contradictory to this Court's efforts to establish a "bright-line" test. Instead, plaintiffs would create a double standard. If the final judgment on the merits of an action could be interpreted in some manner to have either granted or denied a request for costs and fees, then the judgment on the merits must remain a hostage of the ongoing litigation concerning these collateral matters. Only if the request for fees and costs was clearly made after the entry of the final judgment on the merits would the "bright-line" test adopted by this Court apply. Defendants respectfully submit that the United States Court of Appeals for the Tenth Circuit has properly interpreted and followed the intentions of this Court.

Plaintiffs also claim that the United States Court of Appeals for the Tenth Circuit's decision in this action is contrary to this Court's decision in *Osterneck*. In reaching this conclusion, the plaintiffs claim that an award of attorney fees that requires the court to examine and consider the

merits of an action (in determining the liability for and amount of the award) should be treated the same as the prejudgment interest at question in *Osterneck*. Plaintiffs claim that such an attorney fees question is no longer to be considered collateral to the merits.

But this Court once again affirmed that questions of attorney fees are always collateral to the decision on the merits in *Osterneck*. 489 U.S. at 174-76. Plaintiffs' theory that certain attorney fees issues are part of the merits decision of an action is contrary to *Osterneck* and its reliance on this Court's decision in *Budinich*. In *Budinich*, this Court stated:

> This practical approach to the matter suggests that what is of importance here is not preservation of conceptual consistency in the status of a particular fee authorization as "merits" or "nonmerits," but rather preservation of operational consistency and predictability in the overall application of § 1291. This requires, we think, a uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final.
> . . . .
> In short, no interest pertinent to § 1291 is served by according different treatment to attorney's fees deemed part of the merits recovery; and a significant interest is disserved. The time of appealability, having jurisdictional consequences, should above all be clear. We are not inclined to adopt a disposition that requires the merits or nonmerits status of each attorney's fee provision to be clearly established before the time to appeal can be clearly known. Courts and litigants are best served by the bright-line rule, which accords with traditional understanding, that a decision on the merits is a "final decision" for purposes of § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case.

Budinich, 486 U.S. at 202-3.

If the plaintiffs' theory were to be accepted, all attorney fees questions brought pursuant to § 1988 would become part of the merits judgment. The merits must be considered in determining whether the applicant was the prevailing party. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The court must consider the merits of the action in determining the number of hours that were reasonably expended in litigating the matter. 461 U.S. at 433-34. The quality of the prevailing party's victory must be assessed as well in determining what would be an appropriate fee award. 461 U.S. at 434-36. The attorney fees question at issue in this action cannot be distinguished from all other attorney fees claims made under § 1988.

Plaintiffs also claim that the United States Court of Appeals for the Tenth Circuit's decision is contrary to decisions reached by three other United States Circuit Courts of Appeal. Plaintiffs' reliance on *Samuels v. American Motor Sales Corp.*, 909 F.2d 573 (7th Cir. 1992) is misplaced. *Samuels* involved a motion for attorney fees that was

incorrectly styled a Rule 59(e) motion. The United States Court of Appeals for the Seventh Circuit expressly stated that the question of whether or not the rule was applicable to such a request for fees was immaterial. *Id.* at 577. The question actually before the Seventh Circuit was neither the propriety of the original request for fees nor the decision on the merits, but rather the correctness of the trial court's decisions concerning later motions challenging the trial court's decision on the original request for fees. *Id.* at 577-78.

The other two decisions relied upon by the plaintiffs both involved judgments that were not just final as to the merits of the actions, but were final judgments as to the issues of costs and fees as well. *Ramsey v. Colonial Life Ins. Co. of America*, 12 F.3d 472 (5th Cir. 1994); *Penland v. Warren County Jail*, 759 F.2d 524 (6th Cir. 1985). Plaintiffs correctly state that these two decisions held that Rule 59(e) applies to post-judgment motions asking a court to reconsider its final determination on a fees request. But plaintiffs fail to note that the courts limited their decisions in those two cases so as to apply only in circumstances where the trial court's final decision on the merits and its final decision denying fees and costs were combined. The United States Court of Appeals for the Tenth Circuit, in distinguishing *Ramsey*, stated that:

> We do not think that *Ramsey* was meant to apply where the Rule 59(e) motion is directed to a merits judgment *awarding* both attorney's fees and costs which will be quantified at some future date. *Ramsey* pertains to a rule 59(e) motion where the judgment was final not only as to the merits, but also as to

> attorney's fees. 12 F.3d at 473-74. Unlike this case, the judgment incorporating the denial of attorney's fees contemplated no further proceedings. Here, the Rule 59(e) motion questioned *liability* for attorney's fees and costs which had not been set, significant further proceedings were essential on these collateral matters, and Plaintiffs apparently recognized the collateral nature of these issues when they sought to take a separate appeal.

75 F.3d at 568 (emphasis in original).

As the United States Court of Appeals for the Tenth Circuit's decision noted, *Ramsey* expressly limited its holding to circumstances where the motion asked the trial court to reconsider a final judgment that denied the award of attorney fees. 12 F.3d at 477. *Ramsey* thereby distinguished a line of United States Court of Appeals for the Fifth Circuit precedent that supports the decision of the Tenth Circuit in this matter, where the question of an award of fees and costs was ongoing and had not been reduced to a final judgment.

One of those prior decisions was *Campbell v. Bowlin*, 724 F.2d 484 (5th Cir. 1984). *Campbell* held that a motion to supplement the amount of fees awarded to the defendants in the final judgment on the merits could not be considered a Rule 59(e) motion, and therefore did not preclude the plaintiffs from filing a notice of appeal as to the merits.

> If an award of attorneys' fees is collateral to the judgment on the merits, then the time at which they are awarded is immaterial;

> whether awarded at the same time judgment is entered or four months later, they are still collateral to the main cause of action. Therefore, even if the defendants' post-judgment motion could be seen as altering the original award of attorneys' fees, that would not prevent Campbell from proceeding with an appeal of the judgment on the merits.

724 F.2d at 488.

The decision of the United States Court of Appeals for the Tenth Circuit correctly determined that the plaintiffs' motion, that addressed only the collateral issue of attorney fees, did not alter the finality of the trial court's judgment on the merits of this action. In reaching this decision, the Tenth Circuit followed the rationale behind this Court's decisions on this issue.

> This rationale does not contemplate a different result if, instead of the defendants, the plaintiff had sought to alter the original award of attorney's fees to defendants. The merits judgment was final and appealable. Regardless of which side prevails, civil rights actions invariably spawn disputes over attorney's fees; these disputes should not delay the appeal of the merits.

75 F.3d at 568-69.. Plaintiffs have failed to demonstrate any grounds upon which this Court should grant their petition for a writ of certiorari and their petition should therefore be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY 31, 1996